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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1929

No. 113

THE CHESAPEAKE & OHIO RAILWAY COMPANY, PETITIONER,

vs.

R. L. BRYANT, ADMINISTRATOR OF THE ESTATE OF M. L. BRYANT, DECEASED

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

PETITION FOR CERTIORARI FILED MAY 25, 1929

CERTIORARI GRANTED JUNE 3, 1929

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( )

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[fol. 1] **IN SUPREME COURT OF APPEALS OF VIRGINIA, AT STAUNTON**

THE CHESAPEAKE & OHIO RAILWAY COMPANY, a Corporation,

Plaintiff-in-Error,

v.

R. L. BRYANT, Admr. of M. L. BRYANT, Dec'd,

Defendant-in-Error.

To the Honorable Judges of the Supreme Court of Appeals of Virginia:

PETITION FOR WRIT OF ERROR AND ORDER ALLOWING SAME

Your petitioner, The Chesapeake & Ohio Railway Company, a corporation, respectfully represents unto the court that it is aggrieved by a certain judgment entered by the Circuit Court of Alleghany County on April 28th, 1927, in an action at law then therein pending wherein the petitioner was defendant and R. L. Bryant, Administrator of M. L. Bryant, dec'd, was plaintiff, which said judgment was for the sum of $8,000., with interest from its date, and the costs.

A duly certified transcript of the record of said action at law is herewith exhibited.

Statement of the Case

In this petition the defendant in error, R. L. Bryant, Administrator of M. L. Bryant, dec'd, will be referred to as the plaintiff, and your petitioner, the plaintiff in error, as the defendant. All references to the record are to marginal paging.

For some years prior to August 31st, 1925, the plaintiff's intestate, M. L. Bryant, and one C. P. Dodson had been working together as section hands on the defendant's railroad in Alleghany County. On the day mentioned Dodson shot and killed Bryant.

[fol. 2] The plaintiff instituted his action of trespass on the case against the defendant, his declaration alleging that

the relation of master and servant existed between the intestate and the defendant, and, in its first count, that Dodson, the defendant's section foreman, discharged Bryant from the defendant's employment and that then, acting as the defendant's servant and in the course of his employment, had shot and killed Bryant; in its second count, that the defendant employed Dodson, an unfit and dangerous person, who, in the course of his employment and within the scope of his authority killed the intestate.

Bryant and Dodson for some years had been employed by the defendant as section laborers under its section foreman, Long, working near Backbone in Alleghany County. On Thursday, August 27th, Foreman Long was called away because of his mother's illness and death, and with the consent of his superior placed Dodson in charge of the work then being done and the force of hands doing it (Rec., p. 204). This work was, changing the tracks of the main line, putting in new ties and surfacing (Rec., p. 202). The defendant was engaged in, and Bryant was employed in interstate commerce.

The circumstances of the shooting were proved by the plaintiff's witnesses as follows:

On the morning of Monday, August 31st, 1925, the section gang had placed their lever car on the track and were loading it with their tools to continue the work being done at quitting time on the previous Saturday. Bryant came with his dinner bucket, which he put down by the lever car. Dodson was in charge of the force.

Dodson then said, "Bryant, I can't work you any longer" (Thompson, Rec., p. 83). Bryant either did not hear him or paid no attention, but went to the tool house, which was alongside, got his pick and brought it to the car upon which he placed it and his dinner bucket (Frank Wright, Rec., p. 59). Dodson repeated, "I told you I couldn't work you any longer" (Thompson, Rec., p. 83). Bryant replied, "I will give you (Dodson) what is coming to you this morning" (Frank Wright, Rec., pp. 66, 68). Dodson said, "I told you to go on away from here," and drew a pistol (Rec., pp. 66, 67). At that, Bryant said, "What are you going to do with that thing" (Thompson, (Rec., p. 76), "I will make you eat that" (S. J. Wright, Rec., p. 52, Frank Wright, Rec., p. 68, Pierce, Rec., p. 92). Thereupon Dodson fired his pistol and Bryant was mortally wounded,

dying some days afterwards. The plaintiff's witnesses differed somewhat in their recollection of the words used by [fol. 3] Dodson; Frank Wright recollected them as, "I aint got anything more for you to do" (Rec., pp. 59, 65), S. J. Wright, "Fellow, I don't need you any longer" (Rec., p. 40), McDowell, "I aint going to work you any more," to which Bryant replied, "Why, what is that for" (Rec., pp. 134-5).

On his way to his work that morning Bryant had stopped at E. C. Thompson's house, talked with Thompson and as he left said, "Well, I will go on down. I guess Dodson will fire me this morning," and that he, Bryant, had told Dodson, "If he didn't quit talking about him that one or tother of us would have to take a whipping," to which Dodson had replied, "All right, I have got the difference in my pocket" (Rec., p. 161).

Dodson himself, by deposition taken at Richmond, testified for the plaintiff that on the preceding Saturday, as work was ending, Bryant said to him, "I am going to beat the hell out of you"; that he said to Bryant, "After this evening, remember I don't work you any more," and that Bryant replied, "If you cause me to lose my job I will kill you" (Rec., p. 110).

The defendant's supervisor of tracks, in charge of all sections upon that division, testified that on Saturday previous to the killing he was at the work and noticing that Bryant was not working properly directed Dodson to discharge him (Rec., p. 197).

Dodson was instructed, when Foreman Long left him in charge, to go ahead with the work then being done, which would take some four or five days, changing the curve to a uniform line to certain grade stakes, and to look after the general condition of the track, surface and line over the four mile section (Rec., p. 205); he had authority to discharge men under him (Rec., p. 209). Dodson had no authority to police or guard the railroad tracks against trespassers (Rec., p. 207). The plaintiff's witnesses testified that Dodson was a high tempered and nervous man (Rec., pp. 18, 46, 79, 81, 85, 127), but no one had ever known him to have a personal difficulty. One witness, G. F. Wright, said that, "He was sick most of the time with his stomach," and that "he told me he ate oatmeal" (Rec.,

pp. 19-20), and another witness, Taylor Thompson, that Dodson seemed to be a nervous man and would get sick," that "he ate a lot of bran and had indigestion" (Rec., pp. 79-80). The plaintiff's witness, Frank Alfred, testified that Dodson was neither a profane nor a fighting man, "I never knowed him to be in no fight" (Rec., p. 153); S. J. Wright, who had worked with Dodson off and on for about [fol. 4] six months when Foreman Long was gone, had never heard of him having any difficulty with any of the men (Rec., p. 181); E. C. Thompson, that Dodson never had a fight or difficulty with any man while he was there, that the witness never heard of Dodson striking anybody, and never saw him striking anybody, that Dodson was not a fighter and never had any fight or anything like that (Rec., p. 185); McDowell, over a period of two years while he worked with him, had never heard of Dodson having any personal difficulty and had never seen him have a fight with any person. Supervisor of Tracks Crance and Foreman Long, Dodson's superiors, testified for the defendant that he was a competent man of good character, handled men well and got along well with his work. No one had ever complained of Dodson to either witness (Rec., pp. 203, 204, 192, 195).

The defendant proved that it was an interstate carrier engaged in interstate commerce; that the work then being done was on its interstate line (Rec., pp. 192-3, 53, 109); this evidence being introduced in support of the defendant's special plea (Rec., p. 4), and its effect being that the case is governed exclusively by the federal employer's liability act.

In addition to the special plea referred to there was a plea of not guilty.

The defendant demurred to the evidence, the jury assesed damages at $8,000., the Circuit Court overruled the demurrer and entered the judgment complained of. The grounds of the demurrer to the evidence are shown at pp. 299-230 of the record.

Assignment of Error

The Circuit Court erred in overruling the defendant's demurrer to the evidence for the reasons:

First. The defendant cannot be held liable under the Federal Employer's Liability Act, which applies here to the

exclusion of any other statute or rule of law since the intestate's injury and death did not result from the negligence of any of the defendant's officers, agents or employees (Fifth Ground of Demurrer, Rec., p. 229).

Second. Dodson, who shot the plaintiff's intestate, was not acting within the scope of his employment by the defendant, or in the prosecution of the defendant's work, in attacking and injuring the plaintiff's intestate (Third and Fourth Grounds of Demurrer, Rec., p. 229).

[fol. 5] Argument

First. The demurrer to the evidence should have been sustained for the reason that the defendant cannot be held liable under the Federal Employer's Liability Act, which applies here to the exclusion of any other statute or rule of law, since the intestate's injury and death did not result from the negligence of any of the defendant's officers, agents or employees.

1. The defendant proved that it was an interstate carrier engaged in interstate commerce, and that the work done on Saturday previous to the shooting and to be done on the day of the shooting was in the maintenance and improvement of its main line (Rec., pp. 192-3, 53, 109). The defendant's section force, therefore, including the plaintiff's intestate, was employed in interstate commerce.

New York Central R. Co. v. Winfield, 244 U. S. 147, 61 L. ed. 1045;

New York Central R. Co. v. Porter, 249 U. S. 168, 63 L. ed. 536;

Kingell v. C. & St. P. R. Co., 250 U. S. 130, 63 L. ed. 893;

Pedersen v. D. L. & W. R. Co., 229 U. S. 446, 57 L. ed. 1125.

In the Winfield case, supra, the plaintiff was a section laborer assisting in the repair of the carrier's main track, and was tamping cross-ties when injured.

In the Porter case, supra, Porter was a track employee clearing snow from the railroad tracks.

In the Kingell case, supra, the plaintiff's intestate was killed while clearing the tracks of dirt dumped to make an earth fill under a trestle.

In the Pedersen case, supra, the plaintiff was carrying bolts from a shop to a bridge over which interstate commerce was carried, such bolts to be used on the next day or that night.

That the section gang had not yet actually engaged in work on the track, but had only set their lever care on the track and were loading their tools preparatory to going to the place of work, does not alter the case. The work intended to be done is interstate in character and the federal act applies, to the exclusion of any other statute or rule of law, while the employee is going to or is coming from his actual task.

C. & O. Ry. Co. v. Nixon, 140 Va. 351;
C. & O. Ry. Co. v. Nixon, 271 U. S. 218, 70 L. ed. 194;
[fol. 6] Erie R. Co. v. Winfield, 244 U. S. 170, 61 L. ed. 1057;
Pedersen v. D. L. & W. R. Co., supra 229 U. S. 446, 57 L. ed. 1125;
Cudahy P. Co. v. Parramore, 263 U. S. 418, 68 L. ed. 366.
See also San Pedro, etc., v. Davide (C. C. A.), 210 Fed. 870.

In the Nixon case, supra, the plaintiff's decedent, a section foreman, was riding a velocipede on his way to his day's work on an interstate railroad.

In the Pedersen case, supra, the materials which Pedersen was carrying to the place of work were to be used that night or the next day.

In the Winfield case, supra, Winfield, in charge of a switch engine during the day handling both interstate and intrastate traffic, had taken his engine to the place where it was to remain for the night and was killed while leaving the yard. The Court said, "Like his trip through the yard to his engine in the morning, it was a necessary incident to his day's work, and partook of the character of that work as a whole, for it was no more an incident of one part than of another. His day's work was in both interstate

and intrastate commerce, and so, when he was leaving the yard at the time of his injury his employment was in both. That he was employed in interstate commerce is therefore plain'' • • •

In the Parramore case, which did not involve the employer's liability act, Parramore was killed while crossing tracks across the only road going to the Cudahy Packing Company's plant, where the deceased was to begin work within a very few minutes. The Court held that he was then working for the defendant. ''The employment contemplated his entry upon and departure from the premises as much as it contemplated his working there, and must include a reasonable interval of time for that purpose.''

2. Upon receiving the order of discharge Bryant was entitled to a reasonable opportunity to obey the order to quit work and must be regarded as in the service and under the federal employer's liability act during such interval of time as was reasonably required for his departure. He had not become a trespasser upon receipt of the order of discharge. He had come upon the defendant's premises as an employee and at the close of his work was entitled under the law to a reasonable opportunity to leave the premises. He had no such opportunity. ''This whole transaction happened very quickly'' (Rec., p. 83).

[fol. 7] It is unquestionable that if the order which Bryant received had been an order to quit work for the day or any other interval, he would have been treated as an employee during the reasonable interval required for him to obey the order and leave. An order to quit work permanently, a discharge, differs from an order to stop work for the day or temporarily only in its finality.

It is settled law that in leaving the carrier's premises at the close of a day's work, and in coming upon the carrier's premises to engage in work, the employee is discharging a duty of his employment and is entitled to protection as such.

Erie R. Co. v. Winfield, 244 U. S. 170, 61 L. ed. 1057, in which it was said (p. 173):

''In leaving the carrier's yard at the close of the day's work the deceased was but discharging a duty of his employment. See N. C. R. Co. v. Zachary, 232 U. S. 248, 58 L. ed.

591. Like his trip through the yard to his engine in the morning, it was a necessary incident of his day's work." * * * "That he was employed in interstate commerce is therefore plain."

3. The intestate's injury and death did not result from the negligence of any of the defendant's officers, agents or employees; Dodson's act was a wilful wrong.

The federal employer's liability act makes negligence alone the basis of the duty to make compensation and there can be no recovery under the act.

The point has been directly ruled by the United States Supreme Court in the case of Davis v. Green, presently cited, and is settled.

In Davis v. Green, 260 U. S. 349, 67 L. ed. 299, the facts were these: Green, a conductor, was working on a train with McLinden, an engineer. The latter became enraged because a switchman had signalled him twice and when the switchman explained to him that he was acting under the conductor's orders the engineer said that he would kill the switchman and the conductor both. He then knocked the switchman in the head with a hammer and shortly after, meeting Conductor Green, shot and killed him. Green's administratrix brought suit in the Mississippi state court against the Director General of Railroads. It was proved that the conductor and engineer did not get along together [fol. 8] in their work; that the engineer was a contentious, disagreeable and quarrelsome man, and constantly embroiled in quarrels with his fellow employees, that he carried a pistol either in his engine or on his person; that he had been frequently reported to the Company; that he had killed a man before killing Green and that he was regarded by the employees and had the general reputation in the community of being a turbulent, dangerous and violent man. The Supreme Court of Mississippi held the Railway Company liable (87 So. 649).

The United States Supreme Court, in reversing the case held:

"Whatever may be the law of Mississippi, a railroad company is not liable for such an act under the statutes of the United States."

In New York C. R. Co. v. Winfield, supra, (244 U. S. 147, 61 L. ed. 1045), Winfield, employed as a section laborer, had lost an eye through one of the ordinary risks of the work in which he was engaged, and sought compensation from the defendant railroad company under the state workmen's compensation statute. In holding that the federal act was exclusive and superseded all state legislation and common law rules which might give a recovery to an employee under such circumstances, the Court said (italics inserted):

"True, *the act does not require the carrier to respond for injuries occurring where it is not chargeable with negligence,* but this is because Congress, in its discretion, acted upon the principle that compensation should be exacted from the carrier, where, and only where, the injury results from negligence imputable to it. Every part of the act conforms to this principle" * * * "The act plainly shows, as was expressly held in Seaboard Air Line R. Co. v. Horton, 233 U. S. 492, 501, 58 L. ed. 1062, 1068, that it was the intention of Congress to make negligence the basis of the employee's right to damages, and to exclude responsibility of the carrier to the employee for an injury not resulting from its negligence or that of its officers, agents or other employees" * * *

[fol. 9] Again the Court said (p. 153):

"As before indicated, it is a mistake to suppose that injuries occurring without negligence are not reached or affected by the act" * * * "Thus, *the act is as comprehensive of injuries occurring without negligence, as to which class it impliedly excludes liability, as it is of those as to which it imposes liability.*"

In Erie R. Co. v. Winfield, supra, (244 U. S. 170, 61 L. ed. 1057), where an effort was being made to obtain compensation under the state statute for the death of an employee, in denying the applicability of the state statute, where no negligence was alleged or proved, referring to New York C. R. Co. v. Winfield, above cited, the Court said (p. 172):

"We are of opinion that the federal act proceeds upon the principle which regards negligence as the basis of the

duty to make compensation, and excludes the existence of such a duty in the absence of negligence, and that Congress intended the act to be as comprehensive of those instances in which it excludes liability as of those in which liability is imposed."

See also Roebuck v. Atchison, etc., Ry. Co., 99 Kan. 544, 162 Pac. 1153, L. R. A. 1917E, 741, in which recovery under the federal employer's liability act was denied in a case where a section hand stabbed to death a section foreman after the section foreman had notified his superior that he could not work the section hand because of his quarrelsome disposition, that he was a dangerous man and that he had killed one or two men.

Second. Dodson, who shot the plaintiff's intestate, was not acting within the scope of his employment by the defendant, or in the prosecution of the defendant's work, in attacking and injuring the plaintiff's intestate.

The plaintiff's declaration is explicit in its averment that the plaintiff's intestate was employed by the defendant. In the first count it is declared that the intestate began his day's work for the defendant on its section, when the defendant's foreman and servant in the course of his employment or within the scope of his authority directed [fol. 10] the intestate to stop work and to leave the employment, whereupon the defendant's foreman shot the intestate (Rec., p. 2), and the second count declares that the intestate was about his work on August 31st and doing what he was employed to do when the foreman directed him to leave the work and employment and then shot him (Rec., p. 3). If the plaintiff can recover, it must be upon the case made by his pleadings and not otherwise. Citation of authorities to this point is needless.

The plaintiff's witnesses, other than Dodson himself, testified, as has been shown above (p. 3 of the petition), that Dodson told Bryant on Monday morning when he came to his work, "I can't work you any longer" (Rec., p. 83), "I ain't got anything more for you to do" (Rec., pp. 59, 65), "I don't need you any longer" (Rec., p. 40), "I ain't going to work you any more" (Rec., pp. 134-5), and the intestate himself had said on his way to work that, "I guess Dodson

will fire me this morning," (Rec., p. 161). This evidence supported the averment of the declaration that Dodson discharged Bryant on the day of and immediately prior to the shooting, and upon the authorities cited above the federal employer's act is paramount and exclusively controls the relations of the defendant and the intestate and permits no recovery in this case.

Dodson himself, however, testified for the plaintiff that on the preceding Saturday he said to Bryant, "After this evening, remember I don't work you any more" (Rec., p. 110).

Upon this evidence it may be urged either (1) that while in fact the defendant's foreman discharged Bryant, the intestate, on Saturday, thirty-six hours before the shooting, his execution of his authority to discharge employees was not complete and final until Monday, at the time of the shooting, so that regardless of what occurred on Saturday the defendant's foreman was discharging Bryant from its employment on Monday, or (2) that Bryant was discharged on Saturday and that when the defendant's foreman assaulted him on Monday the foreman was performing some other duty, or exercising some other authority than the duty and authority to discharge Bryant.

(1) If it be suggested that the duty and authority to discharge Bryant were not executed and exercised by acting foreman Dodson until Monday, when the shooting occurred, although the exercise of such authority was begun on the [fol. 11] preceding Saturday, then the plaintiff's intestate was still employed by the defendant on the day of the shooting; at that time the defendant was engaged in and the plaintiff's intestate was employed in interstate commerce and their relations as master and servant are exclusively controlled by the federal employer's liability act. And in such case the plaintiff cannot recover for his intestate's injury and death, as has been fully shown by the authorities cited above.

(2) If, however, it be urged that Bryant in fact was discharged on Saturday it necessarily is admitted that acting foreman Dodson's power to discharge Bryant was completely exercised and executed thirty-six hours before the shooting and that his subsequent assault upon the plaintiff's intestate was not done within the scope of that authority.

It must also be admitted in such case that the plaintiff's intestate on the morning of the shooting was not an employee, an invitee, or a licensee, but was a mere trespasser.

The case is to be considered then as that of a trespasser, thirty-six hours out of the defendant's employment, prosecuting his private quarrel with the defendant's employee and coming on the defendant's premises for that purpose. He was prosecuting his private quarrel, for Dodson testified for the plaintiff that Bryant had told him on Saturday afternoon, "If you cause me to lose my job I will kill you" (Rec., p. 110), the intestate that morning on his way to the place had declared to the plaintiff's witness, Thompson, referring to Dodson, that "one or t'other of us would have to take a whipping" (Rec., p. 161); and just before the shooting the intestate had threatened Dodson, "I will give you what is coming to you this morning" (Rec., pp. 66, 68).

The plaintiff introduced, and there was no evidence whatever that acting foreman Dodson was authorized to expel trespassers from the defendant's premises or to interfere with them in any manner whatever, and the defendant proved that he was not given "any authority to police or guard the railroad tracks against trespassers (Rec., p. 207). His whole duty, as shown by the evidence, was: To go ahead with the work being done on the track, detailed by the witness Long, which would take four or five days to complete, to control the men under him upon that work, and to look after the general condition of the track, surface and line over the section of four miles (Rec., p. 207).

Upon this evidence it is clear that Dodson was discharging no duty to his employer whatever, that his assault upon the plaintiff's intestate was not in furtherance of any work [fol. 12] he was to do for his employer, and that in shooting the intestate Dodson was acting for his personal and private aims alone.

Before citing any authorities it is repeated and emphasized that there is no middle ground in this matter. Either Bryant was an employee on Monday morning prior to the shooting, in which case the federal employer's liability act is paramount and permits no recovery, or Bryant had not been an employee for thirty-six hours prior to the shooting, was a mere trespasser, and Dodson was charged with no

duty and vested with no authority whatever in seeking to expel him from the defendant's premises or in assaulting him.

In Myers v. Lewis, 121 Va. 50, 71, it was said that the test of the liability of the master for the tortious act of the servant "is not whether the tortious act itself—the act in the manner in which it was done—is a transaction within the ordinary course of the business of the master or principal, or within the scope of the servant's or agent's authority; but the true test is whether, if the act had been done in a non-tortious manner, the service itself, in which the tortious act was done, was within the ordinary course of such business or within the scope of such authority. That is to say, the true test is, was the service, in which the tortious act was done, incident to the employment? The master or principal is liable for the tortious manner in which the transaction is conducted or a service is performed, entrusted by the former to the latter to be conducted or performed for him in a non-tortious manner."

Applying this test, "Whether, if the act had been done in a non-tortious manner, the service itself, in which the tortious act was done," was within the scope of acting foreman Dodson's authority: What service was Dodson endeavoring to perform for his principal, the defendant? He was not discharging Bryant, for that service had been accomplished thirty-six hours before at another place, and if, at the time of the shooting, he had been discharging that service it has been seen that the federal employer's liability act excludes the operation of any other rule of law or any liability.

Was he protecting his employer's property, the tracks or the surface of the line? The safety of the defendant's property was not endangered; no evidence in the record suggest this theory.

Was he seeking to prevent interference with his and his men's work? No evidence in the record shows that Bryant had interfered or sought to interfere with the men, or with the lever car, and the place of work was one mile distant, so that this theory is untenable.

[fol. 13] Was he seeking to expel a trespasser from the defendant's premises? If so, the evidence proves that Dodson had no authority and no power in that connection. He

was not a policeman, he had no authority to police and he was not authorized to eject or expel trespassers (Rec., p. 207). Thus, we find that applying the test laid down by Myers v. Lewis, "the service in which the tortious act was done was not incident to the employment."

In Davis v. Merrill, 133 Va. 69, 77, the Court, referring to 2 Mechem on Agency, approves a definition of "scope of employment" which excludes such acts as arise "wholly from some external, independent and personal motive on the part of the servant to do the act upon his own account." In this case the evidence shows that Dodson's act arose wholly from an external, independent and personal motive on his part. The evidence shows Bryant's repeated threats to whip Dodson; Dodson's reply to Bryant's threat: "All right, fellow, I have got the difference in my pocket" (Rec., p. 161); Bryant's threat immediately prior to the shooting, then to whip Dodson (Rec., pp. 68).

In this connection see Roberts v. Southern R. Co., 143 N. C. 176, 55 S. E. 509, 8 L. R. A. (N. S.) 798.

The defendant's servant, Dodson, did not shoot the plaintiff's intestate in the exercise of any authority, express or implied, conferred upon him by the defendant, or in furtherance of the defendant's business, which it was employed to do, or in the scope of his employment.

The second count of the declaration alleges that the defendant negligently employed and had in its service a foreman (Dodson) "who was unfit and a dangerous person to perform the duties of foreman and under whom the said intestate was required to work," and that the foreman "acting in the course of his employment, or within the scope of his authority, directed the intestate to leave the work and employment, and intestate did not leave at once" * * * "And the said foreman of said defendant, in the course of his employment, or within the scope of his authority, drew his pistol" and shot the intestate.

It will be observed that there is a complete non sequitur between the averment that the defendant employed an unfit and dangerous person to perform the duties of foreman, and the averment that the foreman shot the defendant. The declaration does not show that the employment of such unfit and dangerous person was the proximate cause of the intestate's injury, so that a discussion of the evidence as

to Dodson's character may well be immaterial upon the case pleaded.

[fol. 14] In addition to this, as is presently shown, the defendant's alleged personal fault in selecting and keeping an employee in its service does not affect the right to recover. If Dodson shot a stranger while acting within the scope of his employment the defendant would be liable no matter how mild and temperate Dodson's character may have been, and, on the other hand, if such shooting was not within the scope of his employment, the defendant could not be held liable no matter how violent and dangerous a man Dodson may have been.

The evidence, however, utterly fails to show that Dodson was an unfit and dangerous person to perform the duties of foreman. The plaintiff's witnesses who testified upon the point at all said that they had never known of him being involved in a personal difficulty or heard of him having a fight. Frank Alfred testified that he was neither a profane nor a fighting man, "I never knowed him to be in no fight" (Rec., p. 153); S. J. Wright testified that he had never heard of Dodson having any difficulty with any of the men (Rec., p. 181); E. C. Thompson testified that Dodson never had a fight or difficulty with any man, that he never heard of Dodson striking anybody, never saw him strike anybody and that he was not a fighter or never had a fight or anything like that (Rec., p. 185); Dodson's superiors, the supervisor of tracks and the section foreman testified for the defendant that Dodson was a competent man, of good character, handled men well, got along well with his work and that no one had ever complained of Dodson to either witness (Rec., pp. 203, 204, 192, 195). There was an utter absence of any evidence that Dodson was vicious, dangerous or violent. The plaintiff's witness, G. T. Wright, testified that Dodson was a high tempered man and hard to get along with, a "contrary" man (Rec., p. 18), sick most of the time with his stomach (Rec., p. 19), who "ate oatmeal" (Rec., p. 20); S. J. Wright testified that "he would fly up where I didn't think he had any business doing it" (Rec., p. 46); Taylor Thompson testified that "he would get mad pretty easy at most anything" (Rec., p. 79), that "he eat a lot of bran and had indigestion" (Rec., p. 80); "he got along with the men, with most of them fairly well, he would

fall out with some of them pretty often, he would get mad pretty quick" (Rec., p. 81); Pierce, that he would "fly off with little things that possibly wouldn't amount to anything much" (Rec., p. 86); E. C. Thompson, that he was high tempered and "would fly up and get mad" (Rec., p. 126), and "wouldn't speak to you hardly ever at times [fol. 15] and then again he would be just as friendly as he could be" (Rec., p. 127); "he would just stop speaking" (Rec., p. 129).

If Bryant came on the premises as an employee and was then discharged, the federal employer's liability act governs and, regardless of Dodson's character, there can be no liability upon the defendant. If Bryant, the intestate, did not come on the premises an employee, but was a stranger and a trespasser at the time of the shooting and the defendant can be held liable, if at all, only under the doctrine of respondeat superior, there can be liability only if Dodson was acting within the scope of his employment in shooting him. Dodson's previous character, whether good or bad, is a matter of indifference. As stated in 6 Labatt, Master and Servant, 2nd ed., Sec. 2224, the master's freedom from personal fault, whether it be in respect to the hiring or retention of the servant in question, does not affect the right of recovery.

This is the rule in Virginia in cases where the foundation of the liability sought to be imposed is the negligent act, not the wilful act of the servant; of necessity the same rule applies where the servant's act complained of is wilful or malicious.

In the case of Virginia Ry. & P. Co. v. Davidson, 119 Va. 313, a stranger was killed through an employee's alleged negligence and the question involved was the admissibility of evidence as to the employee's competency. It was said (p. 319):

"The mere retention in service of a careless employee does not give rise to a cause of action against the employer. This is true even in cases between master and servant where the foundation of the liability is in the employment of incompetent or unfit fellow-servants. * * * The mere employment or retention of an unfit servant cannot be the proximate cause of an accident;"

and again the Court said (p. 323):

"But, as already stated, even in cases between master and servant, the mere employment of an incompetent or careless servant gives no right of action, and the evidence of the latter's reputation is not admitted as tending to show the specific negligence for which the recovery is [fol. 16] sought. That must appear as an independent fact and by independent proof; and the character evidence is admitted for the reasons already stated. In actions brought by a stranger the reason for the rule which permits evidence of reputation does not exist, and the rule itself, therefore, does not apply."

That is to say, that in actions brought by a stranger, evidence of reputation of the employee doing the mischief cannot be used at all against the employer; the reason of course being that the case must depend upon the character of the act causing the injury. And the Court further in its opinion (p. 324) quoted with approval, from the case of Fonda v. St. Paul City Ry. Co., 71 Minn., 74 N. W. 160, 70 Am. St. 341, in which the plaintiff was a stranger and where evidence of the general incompetency of the motorman was introduced, in part as follows:

"The defendant is liable, if at all, for the acts of its servant upon the doctrine of respondeat superior. If the motorman was negligent on this occasion, the defendant is liable, no matter how competent he was or how habitually careful he had been on other occasions. On the other hand, if he was not negligent on this occasion, the defendant is not liable, notwithstanding that he may have been incompetent or habitually careless on former occasions. The sole issue aside from that as to plaintiff's contributory negligence was, whether or not the motorman was guilty of negligence at the time of the accident."

Paraphrasing this quotation: If foreman Dodson was acting within the scope of his employment on this occasion, the defendant is liable to a third person, no matter how competent Dodson was or how habitually good tempered he had been on other occasions. On the other hand, if he was not acting within the scope of his employment on this occa-

sion, the defendant is not liable, notwithstanding that Dodson may have been a violent and dangerous man on former occasions. The sole issue is, whether or not Dodson was acting within the scope of his employment at the time of the shooting.

[fol. 17] Your petitioner insists that this case is governed by the federal employer's liability act to the exclusion of any common law rule, that under that act it cannot be held liable in this case and that the action of the Circuit Court in overruling its demurrer was directly contrary to the decision of the United States Supreme Court in the case of Davis v. Green, 260 U. S. 349, 67 L. ed. 299, above referred to, which authoritatively and finally settled the question.

If it should be considered, however, that the plaintiff's intestate was not an employee on the Monday morning of the shooting but had been discharged on the Saturday before, there can be no liability upon the defendant for the reason that the evidence is clear that its employee, Dodson, was without any authority to police the defendant's premises or to interfere with or expel trespassers, and that, with reference to the plaintiff's intestate, the defendant's employee, Dodson, had no authority, express or implied, and consequently was not acting within the scope of his employment in shooting him.

For the foregoing reasons and such others as may be assigned at the hearing, your petitioner prays that a writ of error and supersedeas to the said judgment may be awarded to it, and that the said judgment may be reviewed and reversed.

And your petitioner will ever pray, etc.

The Chesapeake & Ohio Railway Company, by its Attorney. J. M. Perry, Attorney.

[fol. 18] I, J. M. Perry, an attorney practicing in the Supreme Court of Appeals of Virginia, do certify that in my opinion the judgment of the Circuit Court of Alleghany County in the suit of R. L. Bryant, Admr. of M. L. Bryant, dec'd, vs. The Chesapeake & Ohio Railway Company, the record of which is annexed, should be reviewed by the Supreme Court of Appeals of Virginia.

Given under my hand this 21st day of June, 1927:

J. M. Perry.

Received June 23, 1927. J. M. K.

Writ of error allowed; supersedeas awarded. Bond $10,000.

Robert R. Prentis.

[fol. 19] [Caption omitted]

IN CIRCUIT COURT OF ALLEGHANY COUNTY

R. L. BRYANT, Administrator of M. L. Bryant, Deceased,

vs.

CHESAPEAKE & OHIO RAILWAY COMPANY

DECLARATION

R. L. Bryant, Administrator of M. L. Bryant, deceased, complaints of the Chesapeake and Ohio Railway Company, defendant, of a plea of trespass on the case, for this, to-wit, that heretofore, to-wit, before and at the time of the happening of the mischief hereinafter complained of, said defendant owned and operated a railroad, extending through the County of Alleghany, in the State of Virginia, by its station in the said County known as Backbone, and said plaintiff's intestate, M. L. Bryant, was employed by said defendant as a section hand to work with a gang of section hands employed by said defendant, to work under a foreman and servant of said defendant, to maintain and [fol. 20] keep in repair the road-bed and railroad tracks of said defendant embraced in a section of said road at Backbone in said County. And it was the duty of said defendant to exercise reasonable care for the safety of its servants, and it was the special duty of said defendant not to wrongfully injure or kill its servants, or any one of them, while in its employment, or after dismissing or discharging them, or any one of them, from its service. But said defendant disregarded its duty in this behalf, and, to-wit, on Monday morning, August 31, 1925, when said intestate began his day's work for said defendant as its servant on said section of said defendant's railroad at Backbone in said County, where he was employed to work under the orders and directions of said defendant's foreman and servant in charge, and the said foreman acting for said defendant, in the course of his employment, or within the scope of his

authority, directed said intestate to stop work and to leave the employment, and the said intestate did not after he was discharged leave the premises immediately, and thereupon said foreman and servant of the said defendant, acting as the servant and employee of the defendant, and in the course, or scope of his employment, drew a pistol loaded with bullets and shot said intestate, and as he attempted to flee from defendant's railway bed and tracks, said foreman followed and repeatedly shot and mortally wounded said intestate, and from the effect of his wounds he died shortly thereafter, after having suffered great pain and agony; and said intestate's death was caused by said wrongful act of said defendant company.

Second Count. And for this also, to-wit, that heretofore to-wit, before and at the time of the happening of the mischief hereinafter complained of, said defendant owned and operated a railroad, extending through the County of Alleghany, in the State of Virginia, by its station in the said County known as Backbone, and said plaintiff's intestate, M. L. Bryant, was employed by said defendant as a section ha-d to work with a gang of section hands employed by said defendant, to work under a foreman and servant of said defendant, to maintain and keep in repair the road-bed and railroad tracks of said defendant embraced in a section of said road at Backbone in said County. And it was the duty of said defendant not to employ and keep in its service, as section foreman in charge of said intestate and other section hands working under said foreman, a foreman who was unfit and a dangerous person to act as its foreman and who in the course of his employment was liable in a fit of anger and passion to injure or kill any one of defendant's servants working under said foreman or after being discharged by him. But said defendant disregarded its duty [fol. 21] altogether in this behalf and negligently employed and had in its service at the time of the happening of the mischief hereinafter complained of a foreman who was unfit and a dangerous person to perform the duties of foreman and under whom the said intestate was required to work, and while said intestate was about his work, on the morning of August 31, 1925, and doing what he was employed to do, the said foreman, acting in the course of his employment, or within the scope of his authority, directed

the intestate to leave the work and employment, and intestate did not leave at once and made some excuse for not leaving and the said foreman, of said defendant, in the course of his employment, or within the scope of his authority drew his pistol loaded with bullets and shot the said intestate and as he fled, the said foreman followed and shot intestate repeatedly and mortally wounded him and from his wounds intestate shortly afterwards died, after having suffered great pain and agony; and his death was caused by defendant's negligence in employing and keeping in its service said foreman, whom the defendant knew, or ought to have known, by the exercise of ordinary care, was unfit to act and a dangerous person to be in charge of its section hands.

Wherefore, the said plaintiff, administrator aforesaid, says that he is entitled to recover damages from said defendant, to the amount of Ten Thousand Dollars ($10,000), under the laws of the State of Virginia, for such cases made and provided. And therefore, he brings his suite.

R. L. Bryant, Admr, of M. L. Bryant, Deceased, by Counsel. O. B. Harvey, Curry & Carter, p. q.

In Circuit Court of Alleghany County

[Title omitted]

[fol. 22] Plea—July 16, 1926

This day came the parties by their attorneys and thereupon the Defendant by its attorney for Plea says it is not guilty in manner and for, as the Plaintiff in his Declaration has alleged. And this case is continued.

In Circuit Court of Alleghany County

[Title omitted]

Order Granting Leave to File Special Plea—Oct. 15, 1926

This day came the parties by their attorneys and thereupon the Defendant by its attorney asked leave of the

Court to file in writing its special plea, which is accordingly filed with the right to the Plaintiff to make such defenses to said plea at a later day of the term as it might make at this time.

The special Plea referred to in the foregoing order is in the words and figures following, to-wit:

IN CIRCUIT COURT OF ALLEGHANY COUNTY

[Title omitted]

SPECIAL PLEA

And for a further plea in this behalf, the said defendant, by its attorney, says:

That before and at the time of the supposed commission of the grievances alleged against it by the plaintiff, the defendant was a common carrier by railroad and owned and operated a railroad in and through the County of [fol. 23] Alleghany and the State of Virginia and in the State of West Virginia and in other states, and on and with the said railroad the defendant as such common carrier then was engaged in interstate commerce; and at the day aforesaid the plaintiff's intestate had been and was employed by the defendant to work and labor and worked and labored, as one of the defendant's section force of laborers, in and about the maintenance, upkeep and repair, in said Alleghany County, of the defendant's said interstate railroad, its roadbed, ties and tracks; and said railroad, roadbed, ties and tracks the said defendant then was using as aforesaid in interstate commerce, and the plaintiff's said intestate, as such section laborer, then was engaged in interstate commerce.

And the defendant says that its said railroad and its use thereof and its employment of the plaintiff's intestate and the engagement of said intestate in interstate commerce were and are the defendant's railroad and the defendant's employment of plaintiff's intestate in the said counts mentioned.

And the defendant says that the injury of the plaintiff's intestate in said declaration alleged was not done and inflicted and the said death of the plaintiff's intestate did not

result in whole or in part from the negligence of any of the officers, agents or employees of the defendant.

And this the defendant is ready to verify.

J. M. Perry, p. d.

IN CIRCUIT COURT OF ALLEGHANY COUNTY

[Title omitted]

ORDER GRANTING LEAVE TO AMEND DECLARATION, ETC.—Oct. 22, 1926

This day came the parties, by their attorneys, and upon motion of the plaintiff, by counsel, leave is given him to amend his declaration at the bar of the Court, and it is so [fol. 24] ordered that, by striking out the word "in" and substituting therefore the word "after" in the eighth line from the bottom of page 1 of the declaration in the first count, between the words "or" and "dismissing"; and by striking out the words "stopped work and" and substituting therefore the words "after he was discharged" in the first count, on page 2 and fourth line from the top of page, and between the words "Not" and "leave," and by adding the words "or after being discharged by him, and by adding the words "or after being discharged by him" in the second count on page 2, in second line from bottom and after the word "foreman" at the beginning of said second line; and by striking out the word "as" in the twelfth line from the top of page 3 and by inserting in the room and stead thereof the word "shot" and in the same line, by inserting the words "and as he" after the word "intestate." And thereupon the plaintiff moved the Court to strike out the special plea of the defendant filed in this action October 15, 1926, upon the ground that it had been filed too late under the provisions of Section 6105 of the Code of Virginia and that it raised a question that was outside and foreign to the case stated in the declaration, but the Court overruled the plaintiff's motion to strike out the said special plea and the plaintiff excepted. And thereupon the plaintiff offered to file his special replication to the said special plea of the defendant and the defendant thereupon moved the Court to reject the said replication upon the grounds,

first, that said replication is bad for duplicity and, second, that it is a departure from the plaintiff's case as he has declared it, but the Court overruled the motion of the defendant and ordered the replication to be filed, which was accordingly done, and the defendant thereupon excepted.

The replication to special plea referred to in the foregoing order is in the words and figures following, to-wit:

In Circuit Court of Alleghany County

[Title omitted]

Replication to Special Plea

And the said plaintiff comes and says, that at the time of the happening of the mischief in the declaration complained of the said plaintiff's intestate was not, as in the defendant's special plea alleged, in the employment of the [fol. 25] defendant, and not engaged in interstate commerce. And this the said plaintiff prays may be inquired of by the country.

Curry and Carter, R. B. Stephenson, p. q.

In Circuit Court of Alleghany County

[Title omitted]

Motion to Strike Replication

The Defendant moves to strike out and reject the plaintiff's replication to its special plea, on the grounds first, that said replication is bad for duplicity, and, second, that said replication departs from the plaintiff's case as he has declared it.

J. M. Perry, p. d.

In Circuit Court of Alleghany County

[Title omitted]

Minute Entry—April 27, 1927

This day came the parties by their attorneys and thereupon the Defendant by its attorney filed in writing a statement of the grounds of its defense and a jury being de-

manded thereupon came a jury of seven persons of this county, drawn, summoned and selected in the manner [fol. 26] directed by law, to-wit: F. A. Carter, R. E. Crizer, C. E. Wolfe, W. Robert Owens, Carl Kesner, Ralph V. Metz and C. J. Jones, to whom there was no objection and who were sworn the truth to speak upon the issues joined; and having heard the evidence in part are adjourned over until tomorrow morning at half past nine o'clock.

The statement of ground of defense referred to in the foregoing order are in the words and figures following, to-wit:

IN CIRCUIT COURT OF ALLEGHANY COUNTY

[Title omitted]

STATEMENT OF GROUNDS OF DEFENSE

By way of defence to this action, the defendant will rely upon the following:

I. That it was not guilty of the acts alleged against it in each of the counts of the declaration, and the death of the intestate was not proximately caused by any negligent act or omission on the part of the defendant, as is alleged in the said two counts of the declaration, or either of them.

II. That the killing of the plaintiff's intestate by Dodson (who is the person referred to in the plaintiff's declaration as the defendant's foreman) was not within the scope of said Dodson's employment by the defendant, and was not in the prosecution of the defendant's work, and was a matter for which the defendant was in no wise responsible.

III. That the plaintiff's intestate and the said Dodson were employed by the defendant in interstate commerce at the time of the occurrence of the intestate's said killing, and the defendant then was engaged in interstate commerce; and the defendant was not guilty of any negligence whatever proximately causing or resulting in the intestate's death, and said Dodson, in shooting the intestate, was not acting within the scope of his employment, nor was the said act done in furtherance of the defendant's work or as a part thereof.

[fol. 27] IN CIRCUIT COURT OF ALLEGHANY COUNTY

[Title omitted]

VERDICT AND JUDGMENT—April 28, 1927

This day came again the parties by their attorneys and the Jury adjourned over on yesterday appeared pursuant to their adjournment and heard the evidence in full. Thereupon the Defendant, by its attorney, demurred to the evidence, filing its demurrer in writing, with its statement of the grounds thereof, and the Plaintiff, by his attorneys, joined therein. And the Jury having retired to consider of their verdict, returned into Court and upon their oaths say, "We the Jury upon the issues joined do find for the Plaintiff and assess his damages at $8000.00 if the law be with the Plaintiff; and if the law be with the Defendant, do find for the Defendant." And the Jury are discharged. And the demurrer to the evidence, aforesaid, being argued, and the Court being of the opinion that the law is with the Plaintiff doth overrule said demurrer. Therefore it is considered by the Court that the Plaintiff recover from the Defendant the sum of Eight Thousand Dollars, the damages awarded by the Jury in their verdict aforesaid, with legal interest thereon from this date till paid and his costs by him about his suit in this behalf expended. And it appearing to the Court that the Jury by their verdict have failed to apportion the damages among the widow and children of the deceased, the Court doth proceed to hear evidence and doth direct the Administrator, after the payment of costs of administration and counsel fees, to pay the entire residue of the recovery to Orie Bryant, the widow. But the Defendant desiring to apply to the Supreme Court of Appeals for a writ of error it is further ordered that the execution of this Judgment be, and the same is hereby suspended for the period of sixty days from this day, the Plaintiff by counsel waiving the bond required by statute in such case.

The Evidence referred to in the foregoing order is in the words and figures following, to-wit:

[fol. 28] In Circuit Court of Alleghany County

Statement of Evidence

Stipulation re Death of Marshall Bryant

It is stipulated that Marshall Bryant died September 3rd, 1925, as a result of pistol wounds incicted upon him by Con. P. Dodson, on August 31, 1925, at or near Backbone, Alleghany County, Va.

Evidence Introduced on Behalf of Plaintiff

G. T. Wright sworn for Plaintiff.

Direct examination.

By Mr. Stephenson:

Q. Your name is G. T. Wright?
A. Yes, sir.
Q. Were you raised in this county?
A. Yes, sir.
Q. What is your age?
A. 49.
Q. You were raised on Pott's Creek, were you not?
A. Yes, sir, 20 miles from here.
Q. And you have lived in Alleghany County practically all of your life, haven't you?
A. Yes, sir.
Q. Mr. Wright, have you been employed by the Chesapeake & Ohio Railway Co. at Backbone for some time previous to the time that Mr. Marshall Bryant was killed, I mean before that time?
A. Yes, sir, I had been there three years before that.
Q. You had been working there for three years at that time?
A. Yes, sir, about three years at that time, up until the time he was killed.
Q. Did you know Mr. Con Dodson?

A. Yes, sir.

Q. Was he working there during that time?

A. Yes, sir.

Q. In what capacity did he work? Or what did Mr. Dodson do?

A. He worked on the section just the same as I did and the other men.

[fol. 29] Q. All the time?

A. Yes, sir.

Q. And later did he do other work?

A. Yes, sir, he done other work later on.

Q. What was that?

A. He was put in as a sub-foreman for a while.

Q. And later was he a foreman?

By Mr. Perry: I object to the question as leading. The witness can tell what he did, and what his place was.

By the Court: I sustain the objection. You can ask him what other positions he held with the railroad company.

By Mr. Stephenson:

Q. Now Mr. Wright, you said that Mr. Dodson worked as an Assistant Foreman for a while?

A. Yes, sir.

Q. What did he do while he was Assistant Foreman?

A. While he was assistant foreman he cut off the right of way and pulled up the low joints in the track, dressed up the track and he generally then worked about from two to three men.

Q. Just a small squad?

A. Yes, sir.

Q. Now later on did he hold any other position with the Company besides Assistant Foreman?

A. Yes, sir, he took the whole force over while Mr. Long was off, about three days.

Q. Previous to the time Mr. Long was off, what did he do shortly previous to that?

A. That is, before he taken this job?

Q. Yes, sir?

A. He was a kind of a sub-foreman then.

Q. Did he have a squad of men of his own?

A. Yes, sir.

Q. That he was responsible for?

Objection. Sustained.

[fol. 30] Q. When he was working a squad of men and Mr. Long was there, Mr. Long was the regular foreman, was he not?

A. Yes, sir, he was the regular foreman.

Q. When he was working that squad and Mr. Long was there, how did they work, together or separately?

A. They worked separately.

Q. What do you mean by separately?

A. Well, I suppose maybe Long was a mile or a half a mile from Dodson.

Q. Mr. Long was working one crew at one place on the track and Mr. Dodson was working another one, he had another squad at some remote or different part of the track?

A. Yes, sir.

Q. What number of men was he working?

A. Long worked a pretty good crew, something like seven or eight, and Dodson after he mowed the right of way off and while they were mowing the right of way he had about four or five men, and when they put him to dressing up the track and filling up the low places in the track, he gave him two or three men.

Q. Now was Mr. Long the regular section foreman?

A. Yes, sir.

Q. Was he away from the work a good deal in the month previous to the shooting of Marshall Bryant?

A. No, sir, he wasn't away very much, maybe a day or two out of a week for about three weeks.

Q. A day or two off and on?

A. Yes, sir.

Q. Was he away at the time of his mother's death, or do you recall?

A. He was away then about three days.

Q. What day did he go away that time?

A. I don't recollect but it was something about the middle of the week, I think, about Wednesday or Thursday.

Q. And he was not in charge of the men then again until after Monday or until after Bryant was killed? Is that correct?

A. Yes, sir, he came back and took charge of the men after Dodson killed Bryant, Monday morning.

Q. Now while Mr. Long, the regular foreman was gone from Thursday to Monday was Mr. Dodson in charge of all the men on the section?

A. Yes, sir, he was in charge of all of them while he was gone.

Q. Did you and the others work there for him on the section?

[fol. 31] A. Yes, sir, I never worked right under him, I was ditching along the track and I always worked by myself, but of course I seen him passing backwards and forwards.

Q. But the entire section crew was under his orders or under his control?

A. Yes, sir, under his control.

Q. Do you know whether or not it was the custom of the foreman, Mr. Long, to employ and discharge hands that worked under him?

By Mr. Perry: I object to the question as leading in the first place and in the second place it is very suggestive of the answer.

By the Court: He might ask the question who did the hiring and firing of the men working on the section.

By Mr. Stephenson:

Q. Very well, who did the hiring and the firing of the men on the section?

A. Long was supposed to hire the men and fire the men.

Q. And you have been there for three years?

A. Yes, sir, and that had been the custom.

Q. Do you know anything about Dodson with reference to that matter, of hiring and firing men previous to the time Long left?

A. I don't know how that is ——

By Mr. Perry: Don't answer the question if you don't know how it was in this case.

A. Whether Dodson was supposed to hire the men, or not, but when I was sub-foreman——

By Mr. Perry: I object to that.

By the Court: Yes, I sustain the objection. The question is whether Dodson had the right to hire and fire men.

[fol. 32] By Mr. Stephenson:

Q. Was it the practice of the foremen who was on the section to hire and fire the men, was that the common practice?

A. Yes, sir.

Q. Without any question?

A. Yes, sir.

Q. Do you know whether or not Mr. Dodson had discharged men when he was working a crew there separate and apart from Mr. Long and while Mr. Long was on the works?

By Mr. Perry: I object to the question as irrelevant.

By the Court: Do you mean some other occasion and some other time.

By Mr. Stephenson: Yes.

By the Court: He may answer the question. I overrule the objection. Defendant excepts.

A. Yes, sir, while they worked there he fired three men, or two of them. He fired Snead, at least he told me that he fired him. I was working right close to Dodson and he came down by me, and I think he fired Matheny.

By Mr. Perry: I object to that and move to strike it out.

By the Court: Yes, he cannot tell what he was told.

By Mr. Stephenson:

Q. Just tell what you saw and what you know yourself.

A. I asked him why he wasn't working.

Q. Don't state the talk you had but just state the facts, if you know it as a fact, that he discharged them and they left. Did you, or not, see these men leave Dodson's force and leave the premises?

A. No, sir, I didn't see them come right away from him, they were a few yards above me.

[fol. 33] Q. But you saw them coming away from where his forces were working?

A. Yes, sir.

Q. Did they leave the premises and quit work at that time?

A. They never did work there any more.

Q. That was a man by the name of Snead and a man by the name of Matheny?

A. Yes, sir.

Q. And how long was that before the killing of Marshall Bryant, approximately?

A. I expect it was something like a week.

Q. And he was at that time in charge of one section of the crew and Mr. Long was in charge of another section?

A. Yes, sir.

Q. Now when Mr. Long went away as you have testified, Mr. Dodson remained in charge of the full crew, or all that were left. Is that right?

A. Yes, sir.

Q. Now I want you to tell the jury what type of man Mr. Con P. Dodson was?

Mr. Perry: I object to the question as irrelevant and incompetent.

Objection overruled. Defendant excepts.

By Mr. Stephenson:

Q. I mean with reference to his characteristics in handling men, you understand, his temperament, and temper &c.

A. He was a high tempered man, and he was a man that I wouldn't work under.

Q. You say you would not work under him?

A. Yes, sir, I said that. He was a high tempered man and he was a hard man to get along with. Of course I had a little trouble with him, just walking along with him, and I didn't want to have any more trouble at all, and I wouldn't like to work with him or under him.

Q. What kind of a man was he. You say he was high-tempered. Was he an irritable man to get along with?

A. Yes, sir, he was a hard man to get along with and what I call a contrary man.

[fol. 34] Q. Irritable and contrary?

A. You couldn't suit him in no way you would do your work.

Q. And did he have the faculty of getting along with the men at all? I mean as a foreman over them?

By Mr. Perry: I object to the question as irrlevant and entirely incompetent.

By the Court: I do not think it is irrelevant or incompetent if this witness knows whether he had the faculty of getting along with men, if he knows that I think he ought to be allowed to state what he knows about it.

Defendant excepts.

By Mr. Stephenson:

Q. Read the question.

(Question read to witness.)

A. No, sir, he had right smart trouble with the men that ever worked with him, he was a hard man to get along with.

Q. Was he a man of peculiar nervous and irritable disposition?

Objected to as leading. Overruled. Exception.

A. Yes, sir.

Q. Did he have physical ailments that tended to make him that way, that you know of?

Same objection. Overruled. Exception.

A. No, sir, I don't know that he was, only he was sick most of the time with his stomach.

Q. Sick with his stomach?

A. Yes, sir.

Q. Could he or did he eat what the average and ordinary man would eat?

A. He told me he couldn't——

By Mr. Perry: I object to the answer and ask that it be stricken out.

[fol. 35] By the Court: That may be stricken out.

By Mr. Stephenson: We are trying to show what ailments he had that would tend to make him irritable.

By the Court: I know, but you will have to prove that by some other evidence than Dodson's declaration or what Dodson told him.

By Mr. Stephenson: Would it be proper to show what kind of food he ate?

By the Court: If he knows:

By Mr. Stephenson:

Q. Do you know what kind of food he ate?

A. He told me he ate oat meal.

By Mr. Perry: I object to what he told him.

By the Court:

Q. What you know yourself. Did you ever see him eat?

A. No, sir.

By Mr. Stephenson:

Q. You don't know then?

A. No, sir, only what he told me.

Q. Now you were there with him for three years you have stated, on the work?

A. Yes, sir.

Q. Was he a competent or fit man to handle other men on the works?

Objection. Sustained. Exception.

By Mr. Stephenson: Couldn't he express an opinion on that?

[fol. 36] By the Court: No, sir. He can testify to any peculiar characteristics of Mr. Dodson, if he had any, and any other facts and then as to whether such a man as that is competent is an opinion which the jury could form as well as he, I think.

By Mr. Stephenson:

Q. Now you said that he could not get along with men generally?

A. No, sir, he couldn't get along with men.

Q. Now the condition you have described and the peculiar things that were about Mr. Dodson there, the peculiarities of his, were they commonly known amongst the men that worked there with him; just as you had, and by everybody, was that generally known, or not?

A. Yes, sir.
Q. It was well known?
A. Yes, sir.
Q. You were not present at the killing, were you?
A. No, sir,
Q. Were you out to work with the crew on Sunday previous to Marshall Bryant's death?
A. Yes, sir.
Q. Was that the ordinary work or was it a special call of some kind?
A It was a wreck that happened at B. S. Cabin on Saturday evening late.
Q. Was Mr. Dodson in charge that day, or not?
A. Yes, sir, he was in charge that day. The men was bringing the motor car to Covington and Dodson wasn't along, and we came on down there and worked that night until 12 o'clock.
Q. He was in charge of you men and sent you down there, didn't he?
A. No, sir he was a Backbone and we were here at the wreck and Mr. Young took us on down there.
Q. But Mr. Dodson sent you out didn't he to the work?
A. Yes, sir.
Q. Was that on Sunday that you were working?
A. That was on Saturday night and then Dodson went back with us on Sunday morning.
Q. On Sunday morning Dodson went back with you?
A. Yes, sir.
[fol. 37] Q. Was the deceased, Marshall Bryant, with you on either Saturday night or Sunday working on that wreck?
A. No. sir.
Q. He was not with you?
A. No, sir.
Q. Do you know why he was not along?
A. No, sir, I don't.

Cross-examination.

By Mr. Perry:

Q. Mr. Wright, you say you had trouble with Dodson?
A. Yes, sir.
Q. When was your trouble, how long before this killing?
A. Before he killed Bryant you mean?

Q. Yes, sir?

A. Yes, sir, it was before that.

Q. How long before he killed him?

A. I expect it was about two or three months.

Q. Now when Mr. Long was working on the section and Dodson was doing the ditching or cutting the right of way, how many men did he have under him?

A. He had about four or five.

Q. Where did they start out from in the morning to that work?

A. From the tool house.

Q. When they started out in the morning from the tool house was Mr. Long there with the rest of the section men?

A. Yes, sir.

Q. Did you in that time hear Mr. Long tell Dodson to go up and cut the right of way, or not?

A. No, sir.

Q. Dodson just went on up and began to work cutting the right of way?

A. I say I never heard his tell him because I never worked in the force at that time, I was ditching along the railroad.

Q. At the end of the day when they came back, did they come back to Mr. Long's tool house?

A. Yes, sir.

Q. How long did that cutting of the right of way keep up, how long did it take to cut it?

[fol. 38] A. I think they were about a week, as well as I remember.

Q. That was usually in August, wasn't it?

A. Yes, sir.

Q. Two or three weeks before this thing happened?

A. Yes, sir.

Q. What work did they go to next?

A. They went to silling the ties.

Q. The whole force was silling?

A. Yes, sir.

Q. And Dodson was working along with the other men doing this silling?

A. Yes, sir.

Q. And Long was in charge?

A. Yes, sir.

Q. The force at that time, in this silling, was about how many men?

A. I expect there was something like 10 or 12 of them at that time.

Q. Was it not more than that, didn't they have a good many more than that?

A. I couldn't say, they were just passing by me and of course I never worked with the entire crew, I worked by myself nearly all the time in the ditches.

Q. They kept on with that silling, all the men working together under Mr. Long up to the time that Mr. Long was called away by his mother's illness, didn't they?

A. Yes, sir.

Q. That was the Thursday before?

A. Yes, sir, I think it was.

Q. You say that Mr. Long would go away a day or two a week. Do you mean that happened even before he went away on account of his mother's illness?

A. Yes, sir, most of the time he would go to see his mother, he would go over on Saturday and come back on Sunday. and he wouldn't lose but one day.

Q. Where did his mother live?

A. Over about Caldwell, I think.

Q. Were they still working at silling when Mr. Long was called away on this Thursday?

A. Yes, sir.

Q. Were you up there when Mr. Long was called away or when he left?

A. Yes, sir.

[fol. 39] Q. Did you hear any conversation between Mr. Long and Dodson at the time of his leaving?

A. No, sir.

Q. Dodson simply took his place in the work and continued on with the work?

A. He taken his place and I was working right close to them when Long went away, still I wasn't working right under Long or Dodson, either one.

Q. Who were you under?

A. In a measure I was working for Long but I was by myself just ditching on the railroad.

Q. You were not put under Dodson when Mr. Long left?

A. No, sir.

Q. Did Dodson work as a hand?

A. Yes, sir.

Q. He just worked like the other men?

A. Yes, sir, at times.

Q. And they continued that during the rest of that week in August, I believe?

A. Yes, sir.

Q. Were you present during the work on Saturday any time when the gang was working on this silling?

A. No, sir, not on the section.

Q. How far away from them were you?

A. I expect I was maybe two or three hundred yards at times and then I would move on above them or back below them.

Q. What time on Saturday evening were you called out for the wreck?

A. We were called about four o'clock.

Q. You mean four o'clock in the evening or four o'clock the next morning?

A. Four o'clock Saturday evening. The men were going to Covington here to get groceries on the motor car.

Q. Don't tell what they were going for, but just say you were called on Saturday evening about four o'clock.

A. We were called at Moss Run. Mr. Young got off No. 14 there.

Q. Who was Mr. Young?

A. He is superintendent of the road.

Q. What time did you quit work or what time did the section men quit work on Saturday?

A. Four o'clock.

[fol. 40] Q. Then this was immediately after they quit work?

A. Yes, sir.

Q. Then I understand you worked on that wreck the rest of that night?

A. Yes, sir, until about two o'clock in the night and then we went back home.

Q. Who was in charge of the work then?

A. This fellow Young.

Q. He was the Assistant Supervisor.

A. Yes, sir.

Q. The Supervisor of Track is Mr. Crance, isn't it?

A. I think Crance is.

Q. Now on Sunday was Dodson there working with the men?

A. Yes, sir.

Q. They were still at the wreck?

A. Yes, sir.

Q. And all of the men were working at the wreck?

A. Yes, sir.

Q. On Monday were you at the tool house when the killing took place?

A. No, sir, I went back to ditching. The toolhouse sets in front of my house where I live and when I came out of my house Dodson was sitting there on an iron pipe, right there.

Q. That was after the shooting?

A. No, sir.

Q. Before the shooting?

A. Yes, sir.

Q. That was before the men had come to go to work?

A. Yes, sir.

Q. What other times that you know of in the last six months before this killing was Dodson put in charge of all of the men?

A. I don't think he was put in charge of all of them only about three days while he was off to see his mother, that is the only time he had the whole force.

By Mr. Stephenson:

Q. You were asked whether all of the men were out at work on Saturday night and Sunday. Did you mean to say, or not, that Marshall Bryant was included in that number, or was he?

A. No, sir, he wasn't in it.

[fol. 41] Q. Now Mr. Crance was the man who had charge of the maintenance forces and was over Mr. Long and over Mr. Dodson, wasn't he?

A. Yes, sir.

Q. And Mr. Long when he was on the section had charge of you and all the other men in that section?

A. Yes, sir.

Q. But he was absent, as on this occasion, then Mr. Dodson had charge over you the same way?

Mr. Perry: I object to the question because the witness said there had been no other occasions.

By Mr. Stephenson: I am talking about this occasion.

Q. In other words, he was in charge of you and the other men while Mr. Long was gone on this occasion?

A. Yes, sir.

Q. Did you, or not, mean to say that Mr. Dodson was in charge of the whole force, including yourself, wasn't he?

A. Yes, sir, he was over the whole force.

Q. Including yourself?

A. Yes, sir.

Q. Were you at work at the time of the killing of Marshall Bryant?

A. Yes, sir.

Q. You had gone to work?

A. Yes, sir, I went by the toolhouse and Dodson was sitting out there and I asked him where Mr. Long was.

By Mr. Perry: I object to that, don't state what he said.

By Mr. Stephenson:

Q. But you had gone to work before the killing happened?

A. Yes, sir.

Q. You went to work at seven o'clock, didn't you?

A. Yes, sir.

Q. Or a little after seven?

A. Yes, sir.

[fol. 42] By Mr. Perry:

Q. Who gave you orders what to do while Mr. Long was away?

A. Nobody, I just kept on ditching.

Q. Didn't you say on your cross examination that Dodson was not in charge of you?

A. No, sir, he was in charge of me all right, and if he wanted me away he could have took me away from the ditching.

Q. Did anybody tell you that he was in charge of you?

A. No, sir.

Q. Did Long tell you that he was in charge of you?

A. Of me?

Q. Yes, sir?

A. No, sir.

Q. That is just your conclusion that he was in charge of you?

A. When Mr. Long went away and stayed a while I went on to my ditching, just what he told me to do.

Q. And you didn't take any orders whatever from Dodson, did you?

A. No, sir, he never told me to do anything and I don't reckon he wanted me, of course.

Q. Did you report to Dodson every day?

A. No, sir.

Q. Did you have anything to do with Dodson?

A. No, sir, but I just supposed he put my time down just like Mr. Long did, he knowed I was up there at work.

By Mr. Stephenson:

Q. Your job was not independent and separate and apart from all the other work, was it?

A. Yes, sir, I went along by myself.

Q. You would go along and clean up the ditches and work by yourself. That is what you mean, isn't it?

A. Yes, sir.

Witness stands aside.

SAMUEL J. WRIGHT sworn for plaintiff.

[fol. 43] Direct examination.

By Mr. Stephenson:

Q. This is Mr. Samuel J. Wright?

A. Yes, sir.

Q. You were raised in this county, were you not?

A. Yes, sir.

Q. On Potts Creek, were you?

A. Yes, sir.

Q. What relation are you to Mr. G. T. Wright who has just testified?

A. I am a first cousin of his.

Q. Have you been working for the Chesapeake & Ohio Railway Co. sometime previous to the time when Mr. Marshall Bryant was killed?

A. Yes, sir.

Q. On the Backbone section were you?

A. Yes, sir.

Q. For how long had you been there previous to that, about?

A. Someting close to 12 months.

Q. You knew Mr. Dodson then, did you?

A. Yes, sir.

Q. Who was the regular foreman most of the time when you were working there?

A. C. E. Long.

Q. He was the regular track foreman?

A. Yes, sir.

Q. And above him I believe was Mr. Crantz who had charge of the maintenance of Way of all this territory through here, didn't he?

A. Yes, sir.

Q. What was the common practice of Mr. Long as Section Foreman there with regard to hiring and firing or turning off hands, what was the practice?

Question objected to as Incompetent and Irrelevant.

By the Court: A question probably could be framed so as to leave out the question of common practice. You can ask Mr. Wright who generally hired the men and fired the men.

[fol. 44] By Mr. Stephenson: I submit that is practically the same thing. I cannot see the difference.

By the Court: I don't think there is much difference.

By Mr. Stephenson:

Q. Who commonly hired and fired the men employed on that section force?

A. C. E. Long, he hired them and then he turned them over to Dodson and he told him that if he fired any it would be all right.

By Mr. Perry:

Q. Were you there?

A. Yes, sir.

By Mr. Stephenson:

Q. Do you know that?

A. Yes, sir, he said it was perfectly all right, he said if Dodson fired you, you are fired.

Q. When did that instance occur that you speak of?

A. That is about the time he was cutting the right of way off, and he had a bunch on the upper end cutting this right of way off.

Q. Is that correct?

A. Yes, sir.

Q. Who had a bunch of men on the upper end?

A. Dodson.

Q. Dodson had a crew of his own?

A. Yes, sir.

Q. And they were working separate and apart from Mr. Long's crew at that time?

A. Yes, sir.

Q. Cutting off the right of way?

A. Yes, sir.

Q. And Long told him that he had the right to discharge any of them if he wanted to?

A. Yes, sir.

Q. And you heard that statement made?

A. Yes, sir.

[fol. 45] Q. Now you say that commonly and generally—I think I asked you this question, when Mr. Long was there and in charge of the section and of the section crew, the hands alone he hired them and fired them when he felt like it?

A. Yes, sir.

Q. That was the common practice?

A. Yes, sir.

Q. Do you recall when Mr. Long left or about how long it was that he left previous to the death of Bryant, on the occasion that he had been gone for a few days to his home?

A. I think he had been gone about three or four days but I can't tell you exactly, but about three or four days.

Q. Who was in charge, in his absence, of all the crew?

A. Dodson.

Q. Con P. Dodson?

A. Yes, sir.

Q. You mean the same man that afterwards shot Marshall Bryant?

A. Yes, sir.

Q. Were you working under him at that time?

A. Yes, sir.

Q. Were you taking orders from him?

A. Yes, sir.

Q. And were all of the other men on the Backbone section under him and taking orders from him during that period?

A. Yes, sir.

Q. Is that right?

A. Yes, sir.

Q. He was the foreman in charge of all the section work, was he?

A. Yes, sir.

Q. And nobody else was there?

A. No, sir.

Q. Were you working on the Saturday previous to the death of Marshall Bryant, the Saturday before he was killed on Sunday morning?

A. Yes, sir, I was right there.

Q. Please state whether or not the crew was called out for an emergency wreck that night and Sunday?

A. Yes, sir, we were called out along about five o'clock that evening and on Sunday morning we were called back at seven o'clock.

Q. Was Mr. Dodson with you?

A. Yes, sir.

[fol. 46] Q. What was the nature of that work?

A. They just had a wreck down there and we went to straighten this wreck out.

Q. You mean clearing the track of the wreck?

A. Yes, sir.

Q. It wasn't like ordinary track work then?

A. No, sir.

Q. I mean ordinary repair work. Now was Mr. Con Dodson in charge of you?

A. Yes, sir.

Q. He was there present, was he, on Sunday?

A. Yes, sir.

Q. Was Marshall Bryant present or working either on Saturday night or Sunday?

A. No, sir, he wasn't there.

Q. Were you present on Monday morning when the crew was starting to work from the toolhouse at Backbone?

A. Yes, sir.

Q. Were you present there?

A. Yes, sir.

Q. Do you know about what time you got there that morning?

A. Yes, sir, I got there about ten minutes to seven.

Q. And you went to work at what time?

A. Seven o'clock, we were due to be at the toolhouse.

Q. This toolhouse that you refer to, was that over and adjacent to the tracks of the railroad company, I mean was it close to the tracks?

A. Yes, sir, it was close to the tracks.

Q. The little toolhouse set right by the side of the tracks, didn't it?

A. Yes, sir.

Q. And on the right of way of the company?

A. Yes, sir.

Q. That is where you kept the hand car and other tools that were used to repair the track with?

A. Yes, sir.

Q. Who else was there besides you on the occasion on that Monday morning when Marshall Bryant was killed?

A. There was several of us there, my brother Frank Wright and Sonny Wright.

Q. That is the man who has just testified?

A. Yes, sir.

[fol. 47] Q. He wasn't present right at the place of the killing, was he?

A. No, sir, and Marshall Wright, he was there.

Q. He is not here now, he is in West Virginia somewhere isn't he?

A. Yes, sir, and Hazel Wright, Marshall's wife was there, and Jim Down, he was there and Taylor Thompson, he was there.

By Mr. Perry:

Q. You mean his wife was there when he was killed?

A. Marshall Wright's wife was there right at the house.

By Mr. Stephenson:

Q. Who else was there, was John Pierce and John Price, were they there?

A. Yes, sir.

Q. Now just tell the Court and jury what occurred after that, after Marshall Bryant came there that morning, you were there when he came, were you not?

A. Yes, sir.

Q. Now tell the Court and jury what occurred when he came.

A. When he got there he went into the toolhouse, he started into the toolhouse to get his pick and Dodson said to him "fellow, I don't need you any longer," and Marshall, he went on in and got his pick, he must not have understood him, he went in and got his pick and came back out and set it up on the lever car, and he said to him "fellow——

Q. Who said it?

A. Dodson said to him "fellow, I don't need you any longer," and then Marshall Bryant says "well, I am due to get my money in six hours after I quit," and he went on and got his bucket and he set it up on the car and he says "I will go and see Mr. Long," so Dodson says "fellow, I have just fooled with you long enough, you get away from here," and he just reached around in his pocket like that (indicating) and got his gun out and put it on him.

Q. Put it on him?

A. Yes, sir.

Q. On who?

A. On Bryant.

Q. You mean pointed it at him?

[fol. 48] A. Right like that (indicating) and Bryant says "what are you going to do with that," and I never did understand what Dodson said to him, but about that time he says "I am going to make you eat it."

Q. Who said that?

A. Bryant, and about that time the gun went to firing.

Q. Who was holding it?

A. Dodson.

Q. You say the gun went to firing?

A. Yes, sir.

Q. And was it fired in the direction and did it strike Marshall Bryant right there?

A. Yes sir, it struck him.

Q. You were right there, right close to him?

A. Yes, sir, I seen the smoke hit him.

Q. Now Mr. Wright where were they when that happened?

A. Marshall Bryant was standing at the end, the east end of this lever car and Dodson was standing right over about like you are sitting there, say this is the east end here (indicating).

Q. Say this is the east end, that is heading down towards Covington?

A. Yes, sir.

Q. And this was just a little lever car?

A. Yes, sir.

Q. And Marshall Bryant was standing at the end of that, in between the tracks?

A. Yes, sir.

Q. The lever car was setting on the tracks?

A. Yes, sir.

Q. That was one of the main tracks of the railroad company?

A. Yes, sir, that was the west bound track.

Q. And where was Mr. Dodson?

A. Standing just the same as you are standing there, say this was the lever car and he was standing on that side just like you are there.

By Mr. Perry: You mean three or four feet——

By Mr. Stephenson: Wait a minute, Mr. Perry, I will get at that.

Q. Here was Marshall Bryant standing at the end of that lever car between the tracks?

[fol. 49] A. Yes, sir.

Q. And Mr. Dodson, the foreman, was standing on the left hand side of the track if he was facing towards Covington?

A. Yes, sir.

Q. And on the side of the lever car?

A. Yes, sir.

Q. And about what distance away?

A. About three feet away from him. The lever car is about six foot, I think the lever car is but I won't say for certain, but I believe that is about what they are, about six feet, and he was on the side of the lever car.

Q. He wasn't in reach of him, was he?

A. No, sir.

Q. You really don't know the length of the lever car?

A. No, sir, I don't know that.

Q. Was Mr. Dodson towards or near the other end of the lever car?

A. No, sir, my recollection is he was standing about middle-ways of the lever car.

Q. They were separated by some little distance then?

A. Yes, sir.

Q. And the car was between them?

A. Yes, sir.

Q. Now at that time, and you have detailed the facts, and Mr. Dodson had brought out that gun and told him he meant for him to leave there as you have stated, haven't you?

A. Yes, sir.

Q. Did Mr. Bryant have anything to attack Mr. Dodson with or was he attempting to attack him in any way?

A. No, sir, he didn't have anything.

Q. Are you positive of that?

A. Yes, sir.

Q. Was he trying to get around that lever car?

A. No, sir.

Q. Was he making any effort to get hold of Dodson?

A. No, sir.

Q. Nothing of that sort occurred?

A. No, sir.

Q. And he had nothing in his hands?

A. No, sir, nothing in his hands.

Q. Are you positive of that?

[fol. 50] A. Yes, sir.

Q. Do you know whether he was bare handed, or not?

A. No, sir, he had his gloves on?

Q. Marshall Bryant had his gloves on?

A. Yes, sir.

Q. And he made no motion as if to draw any weapon or anything of that kind, you say?

A. No, sir.

Q. He was standing there with his hands down by his sides, or what?

A. Yes, sir.

Q. And made no advance towards Dodson?

A. No, sir.

Q. That is the way you saw it, is it?

A. Yes, sir.

Q. You have no interest in this matter?

A. No, siree, I haven't.

Q. You are still employed by the railroad company, aren't you?

A. No, sir I aint working for them now.

Q. But you had been a regular employee and you did work for them after that?

A. Yes, sir.

Q. That is Mr. Marshall Bryant that was taken away from there and taken to the hospital at that time?

A. Yes, sir.

Q. That is the same Marshall Bryant?

A. Yes, sir.

Q. And he subsequently died?

A. Yes, sir, that is the same one.

Q. He shot him several times I believe?

A. Yes, sir.

Q. Now Mr. Wright, you knew Con Dodson, didn't you?

A. Yes, sir, I knew him personally while I was there.

Q. You had been working for him for sometime?

A. Yes, sir.

Q. I want you to tell this Court and jury what kind of a man he was with regard to temper and temperament?

A. Well, he was a man like this, he would fly up, he was kinda flighty and would fly up where I didn't think he had any business doing it.

Q. He was quick to fly up?

A. Yes, sir.

[fol. 51] Q. And had a quick temper?

A. Yes, sir.

Q. Was he, or not, an irritable man?

A. They say there was something wrong with him, but I don't know.

By Mr. Perry: I object to the answer and move to strike it out.

By the Court: He said there was something the matter with him and if he knows there was anything the matter with him he can testify to that. Mr. Morris read the question, or read the answer again. (Answer read to the Court.)

By Mr. Curry: That is the very thing the railroad company was expected to know.

By Mr. Perry: I object to that statement in the presence of the jury.

By the Court: I will overrule the objection.

Defendant excepts.

By Mr. Stephenson:

Q. Was it commonly or generally known that he was that sort of a man?

By Mr. Perry: I object to that question.

By the Court: I think you ought to lay the foundation whether this man, Mr. Wright, knew what his general reputation was.

By Mr. Curry: And having something wrong with him.

By Mr. Stephenson:

Q. You have stated he was a man of a flighty and quick tempered and irritable. Did he have the capability of getting along peaceably and amicably with the men that he was working with?

[fol. 52] A. No, sir, he did not.

Q. Was that his general reputation, or not, with reference to these matters you have testified to?

By Mr. Perry: I object to that.

By Mr. Stephenson: Wait until I finish the question.

Mr. Perry: I want to object now. You have not asked what the Court indicated you could ask.

By Mr. Stephenson:

Q. Did you know the general reputation amongst the men with whom Dodson worked there and with whom he worked, you and the other men that he worked with as to this ques-

tion of whether he was an irritable and flighty and quick tempered, do you know his reputation and what they thought of him?

A. Yes, sir.

Q. Was that his reputation?

A. Yes, sir.

Q. And did he have the reputation of being a man that did not get along amicably with other men?

A. Yes, sir.

Q. I am speaking with reference to people he worked with, people that worked under him and for him. That is what you mean, is it?

A. Yes, sir, I know what you mean.

Q. Did he have a violent, stubborn kind of a temper?

Objected to. Sustained.

Cross-examination.

By Mr. Perry:

Q. How long had you worked on that section at the time this happened?

A. Something close to twelve months.

Q. In your work were you under Long?

[fol. 53] A. Yes, sir, I was under Long.

Q. What part of that time, if any, did you work under Dodson?

A. When Mr. Long went away, he goes away and goes off and when he does that he left him in his place.

Q. When did he go away and leave Dodson in his place?

A. I just don't remember when he went away.

Q. It was some days before the killing, wasn't it?

A. Yes, sir.

Q. What work had you been doing during the preceding week?

A. Working on the section, track work.

Q. I know, but what kind of track work, were you with the rest of the gang?

A. Yes, sir, I was with Mr. Long's gang.

Q. You all were doing silling I believe?

A. Yes, sir.

Q. How many men were in that gang?

A. I don't remember, I cannot tell you.

Q. There was more than was usually the case at that time, wasn't there, because you were doing very heavy work, were you not?

A. Yes.

Q. Did you ever personally have any trouble with Dodson?

A. No, I never had any trouble with him.

Q. Dodson was working there when you got there?

A. Yes, sir.

Q. At the time that Long put him in to act as foreman and Long went away, Dodson was working with the rest of the gang with that silling business?

A. No, sir.

Q. What was Dodson doing at that time?

A. He was working above there.

Q. He had finished that work above there, the cutting of the right of way, hadn't he?

A. Yes, sir, and he was putting in a few ties up along there.

Q. How far away?

A. I don't know that, I cannot tell.

Q. In sight?

A. No, sir, he wasn't in sight.

Q. And Long brought him down and put him in charge?

A. Yes, sir.

Q. Did you hear any row between Marshall Bryant and Dodson on Saturday?

[fol. 54] A. No, sir, I didn't hear that.

Q. Were you working anywhere near them?

A. Yes, sir, I was working up above and amongst them, but I never heard a word out of them at all.

Q. On Monday when this shooting occurred, as I understand, Bryant came in like he was going to work?

A. Yes, sir.

Q. Did he bring his bucket and lunch with him?

A. Yes, sir.

Q. Where was Dodson when Bryant came on the right of way?

A. Dodson was right there at the toolhouse.

Q. Did Bryant come up to the toolhouse or go to the tool car?

A. He went to the tool house.

Q. Then what was it that Dodson said to Bryant?
A. He said "fellow, I don't need you any longer."
Q. That is the first thing that Dodson said to Bryant?
A. Yes, sir.
Q. "Fellow, I don't need you any longer"?
A. Yes, sir.
Q. What did Bryant say?
A. Bryant said "well, I generally get my money in six hours after I quit."
Q. Did Dodson say anything about already having fired him?
A. No, sir, he never said a word about that.
Q. He just said "fellow, I don't need you any longer."
A. Yes, sir.
Q. When Bryant said "I generally get my money in six hours after I quit," what did Dodson say?
A. Dodson said "fellow—" I just don't remember what he did say, but any way he said "fellow, I have fooled with you as long as I am going to fool with you."
Q. Didn't Bryant say that he was going to see Mr. Long?
A. Yes, sir, but that was after that.
Q. Dodson then said "fellow, I have fooled with you as long as I expect to fool with you," or something like that?
A. Yes, sir.
Q. Now, go ahead, what else did they say. Then what did Bryant say?
A. Bryant made a reply to him, but after he said that he just reached out in his pocket and pulled out his gun.
Q. What was it Bryant replied to him, don't you know what Bryant said?
[fol. 55] A. No, I don't know what he said to him.
Q. Then it was that Dodson reached around for his gun?
A. When Dodson reached around and got his gun and put it on him he asked him what he going to do with that. I understood what he said then.
Q. And what did Dodson say?
A. Bryant said "I will make you eat that."
Q. Bryant said that?
A. Yes, sir.
Q. And about that time the shooting took place?
A. Yes, sir.

Q. And nothing more than that was said?

A. No, sir.

Q. Did you hear Bryant tell Dodson that he was going to give him what he promised him?

A. No, sir.

Q. You don't know whether he said that, or not?

A. No, sir.

Q. How many men were standing around at that time?

A. I don't remember that, I can't remember that.

Q. How far was the toolhouse from where you all were going to work that morning?

A. Something like a mile.

Q. You were going back to the same place you had worked at on Saturday?

A. Yes, sir.

Q. And after Dodson did this who took charge of the gang?

By Mr. Stephenson: I object to that.

(Question withdrawn.)

By Mr. Stephenson:

Q. What size man was Marshall Bryant and about what would he weigh?

A. The man would weigh I guess 140 or around that.

Q. About what size man was Dodson in comparison with Bryant?

A. I suppose he would weigh around about that, about 135 or 140 pounds.

Q. Was Bryant a good work hand?

A. Yes, sir, I never seen anything the matter with his work.

[fol. 56] Q. In regard to the question of size, I believe Dodson was a taller man than Bryant?

A. Yes, sir, Bryant was a low heavy set man.

Q. What wages did Marshall Bryant make?

By Mr. Perry: I object to that. Certainly this witness is not competent to tell what wages the other men made.

By the Court: If he knows he can state it, he may have seen the money paid to him.

By Mr. Perry: If he did that it would be all right.

By Mr. Stephenson:

Q. Do you know what wages he was making?
A. No, sir, I don't know that.
Q. Was he in the same kind of work that you were?
A. Yes, sir.
Q. You were doing exactly the same work that he was and worked the same hours?
A. Yes, sir.
Q. And what did you make?

Objection. Overruled. Exception.

A. $2.96 a day.
Q. When was it that Dodson said to Bryant "I have fooled with you as long as I am going to, and I want you to get away from here," or words to that effect. When did that happen?
A. That happened that morning.
Q. In that conversation?
A. Yes, sir.
Q. Was that immediately or shortly before he was shot?
A. Yes, sir, about the time he shot him.
Q. He told him he wasn't going to fool with him and wanted him to get away, or something of that kind.
A. Yes, sir.

Witness stands aside.

[fol. 57] FRANK WRIGHT sworn for plaintiff.

Direct examination.

By Mr. Stephenson:

Q. Your name is Frank Wright?
A. Yes, sir.
Q. You were raised in this county, were you?
A. Yes, sir.
Q. You are a brother of Sam Wright who has just testified?
A. Yes, sir.
Q. Were you employed on the Backbone section by the Chesapeake & Ohio Railway Co. shortly previous to the death of Marshall Bryant?

A. Yes, sir.

Q. You had not been there very long?

A. No, sir.

Q. About how long?

A. I hadn't been there more than a couple or three months, or somewhere along there.

Q. Are you working there now?

A. Yes, sir.

Q. You are still working on the section?

A. Yes, sir.

Q. Were you present on the Saturday previous to the day on which Marshall Bryant was killed, I mean the Saturday before the Monday?

A. Yes, sir.

Q. Who was in charge of the men from about the middle of the previous week up until the time that Marshall Bryant was shot by Mr. Dodson, who was in charge of the men?

A. Dodson was running us.

Q. Dodson was the man in charge?

A. Yes, sir.

Q. Mr. Long, the regular foreman was gone, was he?

A. Yes, sir.

Q. Were you present at the toolhouse on Monday morning when the shooting occurred?

A. Yes, sir.

Q. Were you pretty close to it?

A. Yes, sir.

[fol. 58] Q. Had you been out and worked the Sunday previous?

A. Yes, sir.

Q. And Saturday night before Sunday?

A. Yes, sir.

Q. Who was in charge of you?

A. Dodson, he was in charge of us.

Q. What were you doing?

A. We came down here to a wreck.

Q. You were cleaning up a wreck?

A. Yes, sir.

Q. On the main line of the Chesapeake & Ohio Railway?

A. Yes, sir.

Q. Was Marshall Bryant along either time?

A. No, sir.

Q. He was not along?

A. No, sir.

Q. Now on Monday morning where did you start from, where did you start from to go to your work, from what point?

A. We started from the toolhouse up at the west end of the section to work where we worked the Saturday before that.

Q. You started from the Backbone toolhouse?

A. Yes, sir.

Q. The tool house was close to the track, wasn't it?

A. Yes, sir.

Q. What was the first that you heard of the difficulty between Dodson and Bryant?

A. I never heard anything only on Saturday before I heard Dodson say "you keep on yapping around here you wont have anything to do," and that was on Saturday before the shooting occurred on Monday morning.

Q. You heard that on Saturday?

A. Yes, sir.

Q. "If you keep on yapping around here you wont have anything to do?"

A. Yes, sir.

Q. Was Bryant a good hand, or not?

Objection. Overruled.

Q. Was he a good industrious man, or not?

A. Yes, sir, he done as good as the rest of them out there.

Q. He did as good work as anybody did on the shift?

[fol. 59] A. Yes, sir.

Q. Was there any reply made to that statement that you heard on Saturday by Bryant to Dodson?

A. No, sir.

Q. You didn't hear any reply?

A. No, sir.

Q. He did not come out and work Saturday evening and Sunday?

A. No, sir.

Q. Now on Monday morning when you went to the toolhouse what was the first thing you knew of any difficulty there?

A. All I heard was when he stepped up into the toolhouse there I heard Dodson say to Bryant "I ain't got anything more for you to do."

Q. He was stepping in towards the toolhouse?

A. Yes, sir.

Q. And at that time Dodson said to Bryant "I haven't got anything more for you to do."

A. Yes, sir.

Q. "Haven't got anything for you to do?"

A. Yes, sir.

Q. Then what happened after that, tell the Court and jury the way it occurred and what you saw?

A. When Dodson told him that Bryant, he just walked on to the toolhouse and got his pick and walked on out to the car and put it on the car.

Q. Did he have his dinner bucket with him?

A. Yes, sir, he put his dinner bucket and pick on the car.

Q. Where was the car?

A. It was setting on the west bound track.

Q. It was setting on the rails ready to start off?

A. Yes, sir.

Q. It was starting time, wasn't it, 7 o'clock in the morning?

A. Yes, sir.

Q. Now what occurred then after he had put these things on the car?

A. He told him again that he told him he didn't have anything more for him to do.

Q. Mr. Dodson told him that?

A. Yes, sir and so Bryant never said anything right then, and he said "I told you to get on away from here."

Q. Who said that?

[fol. 60] A. Dodson, and Bryant, he never went right then, and Dodson he went to get his gun then.

Q. Where did he reach to get his gun?

A. He went and got it in his hip pocket.

Q. Bryant did not get away when he told him to?

A. No, sir, he was standing there.

Q. Had he made any attempt to attack Mr. Dodson in any way shape or form or fashion?

A. No, sir, not a thing.

Q. Any movement towards him?

A. No, sir.

Q. Did he make any motion towards his pocket as if to get a weapon or anything of that kind?

A. No, sir, he had his gloves on.

Q. Did he have anything in his hand?

A. No, sir, except he had his gloves on.

Q. Where were his hands?

A. Down by the side of him.

Q. That car was standing on the track and where was Bryant standing with reference to the end of the car?

A. He was standing about middle ways of the lever car.

Q. On the end of it?

A. Yes, sir, on the east end.

Q. Now let us take this table as the lever car, and call that end towards Covington.

A. Call that the east end and this the west end, and he was standing down at the east end, Mr. Bryant was, and Dodson was standing just about by the side of the car like you are standing.

Q. And what about the distance between them?

A. Just about like that.

Q. About like the distance from the end of that able to where I am now standing?

A. Yes, sir.

Q. Something like 6 or 7 feet do you think, is that correct?

A. Yes, sir.

Q. And the conversation that you have narrated took place right between them leading up to the shooting?

A. Yes, sir.

Q. And they were in that position?

A. Yes, sir.

[fol. 61] Q. Immediately previous to the drawing of the gun by Mr. Dodson,—you saw him draw the gun, did you?

A. Yes, sir.

Q. Immediately previous to that had Marshall Bryant done anything to indicate that he was going to attempt to come around that lever car to attack him or anything of that kind?

A. No, sir.

Q. He was standing there with his gloves on ready to go to work?

A. Yes, sir.

Q. Had Mr. Dodson told him to get away or anything of that kind?

A. No, sir, he told him before that, and he shot him after he pulled his gun out.

Q. He was standing right there when he shot him?
A. Yes, sir.
Q. In the manner you have indicated?
A. Yes, sir.
Q. And he told him to get away and he just pulled his gun out and shot him?
A. He told him to get away, he said "I told you to get away," and Bryant never went.
Q. He shot him several times?
A. He shot him once right here (indicating) and once in the arm here and here (indicating).
Q. Was that the same Marshall Bryant that was immediately after that taken away from there and taken to the C. & O. hospital?
A. Yes, sir.
Q. Where he ultimately died, but that is admitted here?
A. Yes, sir.
Q. Have you any interest in this case?
A. No, sir.
Q. Are you any kin to any of the parties?
A. No, sir.
Q. And your brother is not kin or related to them? and neither is G. T. Wright, who has testified here?
A. No, sir.
Q. You are still in the service of the Chesapeake & Ohio Railway Co.?
A. Yes, sir, I am still on the job.
Q. This man Bryant you had only known just a short time?
A. Yes, sir.
[fol. 62] Q. And Mr. Dodson you hadn't known so very long?
A. No, sir.

Cross-examination.

By Mr. Perry:

Q. You testified before the Justice of the Peace at the preliminary hearing, didn't you, when Dodson was arrested?
A. Yes, sir.

Q. That occurred a few days after the shooting?

A. Yes, sir.

Q. Now wont you tell the jury just what happened on Saturday evening about quitting time, I believe you said Dodson said to Marshall Bryant "if you keep on yapping around here you wont have anything to do"?

A. Yes, sir, he said that to Bryant.

Q. Did Bryant at that time make any reply?

A. No, sir, he never raised up.

Q. After that did you see Bryant and Dodson talking together?

A. No, sir.

Q. You didn't hear anything else that occurred that day?

A. No, sir.

Q. Now on Monday morning the first thing I believe was Bryant came toward the toolhouse like he was going to work?

A. Yes, sir.

Q. And Dodson says, "I aint got anything for you to do."

A. Yes, sir, that is what he said.

Q. Now what was Bryant's reply, or did he say anything?

A. He never said a word.

Q. He didn't seem like he heard it?

A. I don't reckon he did.

Q. But he went on into the toolhouse?

A. Yes, sir.

Q. Then Bryant came out of the toolhouse with a pick. Is that right?

A. Yes, sir.

Q. And he brought that and put it on the car?

A. Yes, sir.

Q. Where was Dodson at that time?

A. He had walked over to the side of the lever car then.

[fol. 63] Q. Dodson was over beside the car?

A. Yes, sir.

Q. Did Bryant put his pick on the tool car, or not?

A. Yes, sir.

Q. Then what did Bryant say or what did Dodson say?

A. Dodson told him to go on away and Bryant never went.

Q. Did you hear Bryant say anything about "I will get the money that is coming to me in six hours," or anything of that sort?

A. No, sir, I never heard that.

Q. Do you remember hearing Bryant say to Dodson just at that time "I will give you what is coming to you this morning"?

A. Yes, sir, I heard that.

Q. You heard him say that?

A. Yes, sir.

Q. Bryant said "I will give you what is coming to you this morning"?

A. Yes, sir.

Q. He was talking to Dodson?

A. Yes, sir.

Q. Was that before Dodson pulled his gun, or not?

A. That was before he pulled his gun.

Q. Then what did Dodson say to that?

A. He got his gun then, when he told him that.

Q. And then Bryant said "I will make you eat that up"?

A. Yes, sir, he said "I will make you eat that damn thing."

Q. So the way the thing happened as you remember it is, first Dodson says "I told you I didn't have anything more for you to do." That is right, isn't it, or words to that effect?

A. Yes, sir.

Q. Then Bryant said to Dodson "I will give you what is coming to you this morning"?

A. Yes, sir, that is what he said.

Q. And then Dodson said "I told you to get on away from here"?

A. Yes, sir.

Q. And pulled his gun?

A. Yes, sir.

Q. Was that when he pulled his gun?

A. How is that?

Q. Dodson then said "I told you to get away from here"?

A. Yes, sir.

Q. Was that when Dodson pulled his gun?

A. No, sir, he never pulled his gun until Bryant told him he would give him what is coming to him.

[fol. 64] Q. Then he pulled his gun?

A. Yes, sir.

Q. Didn't Dodson say "I told you to go away from here"?

A. No, sir, he said that before, and then Bryant spoke up and said "I will give you what is coming to you this morning."

Q. And then he pulled his gun?

A. Yes, sir.

Q. And then Bryant said "I will make you eat that thing up," or something to that effect?

A. Yes, sir.

Q. And then the shooting began?

A. Yes, sir.

By Mr. Stephenson:

Q. After Mr. Dodson had pulled out his gun, and had it drawn on Bryant, he made the remark, "I will make you eat that thing"?

A. Yes, sir.

Q. In other words, Dodson was standing here something like I am with a gun drawn on him?

A. Yes, sir.

Q. And Bryant was standing there doing nothing except he said "I will make you eat that thing"?

A. Yes, sir.

Q. And you tell the jury positively that he was unarmed, and made no effort to strike him?

A. He was not armed, he didn't have anything.

Q. He made no effort to reach for anything on the hand car or any place else?

A. No, sir.

Witness stands aside.

Taylor C. Thompson sworn for plaintiff.

Direct examination.

By Mr. Stephenson:

Q. Were you working on the section at Backbone at the time of the killing of Marshall Bryant and previous thereto?

A. Yes, sir.

[fol. 65] Q. On Monday, August 31st, 1925?

A. Yes, sir.

Q. How long had you been working there?

A. I had been working there about eight or ten months or pretty close to that, I don't know just exactly how long.

Q. Maybe a year?

A. Yes, sir.

Q. But you are not sure?

A. No, sir.

Q. Your father also worked there?

A. Yes, sir, he had been working there about a year before I went there.

Q. You are a married man?

A. Yes, sir.

Q. You knew Marshall Bryant, did you?

A. Yes, sir.

Q. Was he a married man?

A. Yes, sir.

Q. Was he living there near Backbone?

A. Yes, sir, he was living up right above the tank.

Q. What family did he have?

A. Him and his wife and his little boy.

Q. Did he have one or two children?

A. I don't remember.

Q. But you knew that he had one?

A. Yes, sir.

Q. A small child, was it?

A. Yes, sir.

Q. His wife is here I believe, isn't she, today?

A. Yes, sir.

Q. He was a young man, or what age was he, do you know, approximately?

A. He was about 23 or 24 or 25 maybe, I don't know just what his age was.

Q. About what size and weight man was he?

A. He was a kind of a low heavy set fellow and he looked like he weighed about 140 pounds.

Q. He was a low built man?

A. Yes, sir.

Q. You knew Mr. Dodson, didn't you?

A. Yes, sir, I knew him after I moved up there.

Q. About what weight man was Mr. Dodson?

[fol. 66] A. He was tall and slim and he was about the same size of Mr. Bryant, I reckon there was not much difference in them.

Q. About the same weight you mean?

A. Yes, sir, he was taller than Mr. Bryant but he wasn't as heavy.

Q. They were men about equal size and strength then?

A. Yes, sir.

Q. Mr. Long, I believe, was the regular section foreman there in charge of that section, wasn't he?

A. Yes, sir.

Q. And Mr. Dodson, when was he in charge of the force, if at all?

A. He had been in charge of the force and they had been cutting some of the right of way off the same week on the upper end, probably a month before he had charge of the whole force, he had a few men up there working.

Q. He had a few men under him separate from Mr. Long, you mean?

A. Yes, sir, and while Mr. Long's mother was sick the whole force was left to him then, he worked them all then, while Mr. Long was away.

Q. Those were the days preceding the shooting of Mr. Bryant?

A. Yes, sir.

Q. Was Mr. Dodson the only foreman at that time?

A. There was an extra force in there at that time but Mr. Wickline had charge of that force.

Q. I mean the force you were working on, was he the only man in charge in the absence of Mr. Long?

A. Yes, sir.

Q. And did he direct the operations of that force while Mr. Long was gone?

A. Yes, sir.

Q. And have control of it?

A. Yes, sir.

Q. Were you present on the morning of August 31st, Monday morning when Marshall Bryant was killed?

A. Yes, sir, I was there that morning.

Q. You were there with the other men, what were you getting ready to do?

A. We were getting ready to go to work that morning.

Q. You were just starting to work?

A. Yes, sir.

[fol. 67] Q. It was about time for work to begin, wasn't it?

A. Yes, sir, about seven o'clock.

Q. Had the car been placed on the track by you men, or some of you?

A. Yes, sir.

Q. Before this difficulty occurred?

A. Yes, sir.

Q. Were you pretty close to Mr. Bryant when this difficulty did occur?

A. I was standing right by the side of him when he was shot, we were both standing up between the two rails on the west track.

Q. You were on the same end of the track that he was?

A. Yes, sir.

Q. About how far away was Dodson at that time when he shot him?

A. He was something probably about eight or ten or maybe 12 feet, just across the car.

Q. And where was Mr. Dodson standing, was he at the end or the side of the car or where was he?

A. He was at the side of the car.

Q. Which side?

A. He was on the right hand side going up, on the west track.

Q. That would be the left hand side coming east?

A. Yes, sir.

Q. And he was on the north side of the track?

A. Yes, sir.

Q. Was that the west bound track that the car was on?

A. Yes, sir.

Q. Now say this was the lever car, this table, he was on this side of it, if this table was the lever car, he was on this side of it and Mr. Dodson was facing east and this was the east end of it (indicating)?

A. Yes, sir.

Q. And Bryant was standing over there and you were standing by the side of him?

A. Yes, sir.

Q. Now just tell the Court and jury what took place there, what you saw take place and heard at that time?

A. I live right above the toolhouse, and I always waited until Mr. Dodson came down going down to the toolhouse and he went by and I went to the toolhouse to unlock the toolhouse, and we set the lever car on and was getting the tools out.

[fol. 68] By Mr. Perry:

Q. On which track did you set the lever car?

A. On the west track and Mr. Bryant he came down and he stopped when he got to the end of the car and he set his dinner bucket down and went to the toolhouse to get his pick or shovel or some kind of a tool and he brought it back and put it on the car and picked his dinner bucket up and set it on the car and walked behind the car and Mr. Bryant and I were going to get on the hind end of the car, we were just ready to step on the rear end of the car and Mr. Dodson was over on the side the brake was on, he always rode over there, and he was standing over by the side of the car and he told him when he came down to set his bucket down that he wouldn't work him any longer.

Q. Mr. Dodson told Bryant that?

A. Yes, sir, and they were getting ready to get on the car and he told him, he said "I told you, Bryant, I wouldn't work you any longer," and Bryant said "where is Mr. Long," and he said "he is over at the house in bed, or he was when I left," he had been up with his mother, I think that night, and he said, "I will go over and see him," he said "he hired me and if he wants to fire me he can fire me," so we were going over and I reckon Mr. Dodson took his gun out of his pocket and told him "Bryant, I told you to get off the job, you get away from here."

By Mr. Perry: I ask the Court to strike out what the witness reckons.

By the Court: I think that is proper that he started, but he reckoned he was going on over there. I don't think that is incompetent.

Defendant excepts.

By Mr. Stephenson:

Q. Go ahead.

A. He asked him "what are you going to do with that thing."

Q. Who said that?

A. Mr. Bryant, and I don't remember whether Dodson answered him then, or not, but he shot at him and shot a couple of times and Bryant started to run and he kept his shot until he emptied his gun I suppose he shot five times, and Bryant ran around the toolhouse.

[fol. 69] By Mr. Perry: Never mind as to that.

By Mr. Stephenson: That is all right.

Q. Was the shooting immediately after he got his gun out, did he start to shoot?

A. Yes, sir.

Q. Immediately he drew out his gun?

A. Yes, sir.

Q. At that time you were standing on this side of the lever car?

A. Yes, sir.

Q. And you were standing right there by the side of Marshall Bryant, between the rails?

A. Yes, sir.

Q. And the lever car was on the westbound track?

A. Yes, sir.

Q. You were very close to him when it started?

A. Yes, sir.

Q. At that time was Marshall Bryant making any movement or attempting to attack Mr. Dodson in any way whatsoever?

A. No, sir, not as I could ever tell, he didn't have anything in his hand and he did not start towards him.

Q. You are positive of that?

A. Yes, sir.

Q. Did he make any motion as if to draw a weapon or anything of that kind?

A. No, sir, I never saw it.

Q. Where were Bryant's hands?

A. Bryant had his hands down like this (indicating) and had his gloves on.

Q. Down by his side?

A. Yes, sir, just like anyone would carry his hands.

Q. And he was not making any movement to take hold of any implement or anything of that kind, you tell the jury, was he?

A. No, sir.

Q. Nothing like that occurred and you were right there where you could see?

A. Yes, sir.

Q. Have you any interest in this case at all?

A. No, sir.

Q. You are not any kin to any of these people, are you?

A. No, sir.

[fol. 70] Q. You knew Mr. Dodson there, didn't you?

A. Yes, sir.

Q. You had been working for him for practically a year?

A. Yes, sir, but he had been working away from me while he was on the upper end and I was with Mr. Long.

Q. Was he an irritable man?

Question objected to.

By the Court: He can testify himself if you will frame your question properly.

By Mr. Stephenson:

Q. What kind of a man was Dodson with reference to the question of his temperament and general disposition?

A. He seemed to be a kind of a nervous fellow and I believe he would get sick, or something, he had a peculiar kind of a way that most people didn't like. Of course I got along with Mr. Dodson all right while I was there.

Q. But he had a peculiar way about him, you say, that people did not like?

A. Yes, sir, lots of people up there didn't like Mr. Dodson very much, he would get mad pretty easy at most anything.

Q. And flare up without much cause?

By Mr. Perry: I object to that because the witness has not said anything about his flaring up.

By Mr. Stephenson:

Q. You stated, I believe, that he complained of being sick, or something of that kind?

A. I don't know that he complained very much, but he didn't look like he might be well. Mr. Alfred said he eat a lot of bran and had indigestion.

By Mr. Perry: I object to that. Let the witness tell what he knows and not what other people told him.

By the Court: Yes.

[fol. 71] By Mr. Stephenson:

Q. You knew the people that he worked with there and that knew him in that community, the men on the works, you knew them all pretty well?

A. Yes, sir.

Q. Did you know his reputation in regard to the characteristics you have detailed as to nervousness &c?

A. He was nervous.

Q. Did you know his reputation, that is, what people thought about him in regard to that, what other men thought of him?

A. The other men thought the same.

Q. That is what was generally thought of Dodson touching the question of his temperament and disposition, is that right?

A. Yes, sir.

Q. It was a well known fact and known by everybody in other words?

A. Yes, sir.

Q. Did he have the reputation, or not, of being a man that could not get along pleasantly and amiably with other men?

By Mr. Perry: I object to the question.

By the Court:

Q. What was his reputation in that respect, Taylor, what was his general reputation, if you knew it, about getting along with his men that way, under him?

A. He got along with the men, with most of the men fairly well, but he would fall out with some of them pretty often, he would get mad pretty quick and of course the other men didn't ever bother him and I didn't bother him myself, what he said went and of course he was the foreman over

the other men most of the time, when Mr. Long wasn't there he was.

Cross-examination.

By Mr. Perry:

Q. Mr. Thompson, that Saturday before this killing were you working in the gang with Dodson and Bryant?

A. Yes, sir.

[fol. 72] Q. What were you all doing, what were you working at?

A. We were silling that morning and that evening we pulled up one rail that morning and that evening we pulled up one rail on the west track around the curve east of Moss Tunnel.

Q. Did you hear any words at all between Bryant and Dodson?

A. No, sir, I didn't hear any that evening.

Q. Did you hear any conversation between them?

A. No, sir.

Q. Did you see them talking together or anything of that sort?

A. No, sir, I never did except when Dodson would tell Mr. Bryant to do something.

Q. On Monday morning you were standing on the south side of the track in between the two rails and Bryant was at your right?

A. Yes, sir.

Q. More towards the north side between the rails, is that right?

A. Yes, sir.

Q. And there wasn't anybody between him and Dodson who was around on the side of the car?

A. Just the lever car between them.

Q. That lever car isn't more than five or six feet long, is it?

A. I don't know, about eight feet, I reckon.

Q. So they were not quite as far apart as six or eight feet?

A. They were, I would say, about eight or ten feet.

Q. They were in a distance where a man could hit the other man with a pick if he had a pick in his hand?

A. No, sir, he couldn't reach that far with a pick.

Q. So it must have been five or six feet any way?

A. Yes, sir.

Q. I wish you could try to remember exactly what each one of these men said. Dodson first said "I can't work you any longer," or "I told you I can't work you any longer," which did he say, do you remember?

A. He first said "Bryant, I can't work you any longer," and I don't know whether Bryant heard him, or not, he didn't say anything to him.

Q. And the next time he said "I told you I couldn't work you any longer."

A. Yes, sir.

Q. Do you remember Bryant saying anything about he would make him eat up that gun?

A. No, sir, I didn't hear that.

[fol. 73] Q. Do you remember Bryant saying anything about "I am going to give you what is coming to you this morning"?

A. No, sir, I never heard him say that. I heard some of them say that he said it, but I didn't hear it .

Q. Don't say what others said; you yourself did not hear it?

A. No, sir, I didn't hear it.

Q. I expect in a minute afterwards everything was excitement?

A. Yes, sir.

By Mr. Stephenson:

Q. This whole transaction happened very quickly, didn't it?

A. Yes, sir, pretty quick.

Witness stands aside.

JOHN L. PIERCE (col'd) sworn for plaintiff.

Direct examination.

By Mr. Stephenson:

Q. Where do you live?

A. I live up about a mile of Backbone there.

Q. Near Backbone?

A. Yes, sir.

Q You have been living there for several years, have you?

A. Yes, sir.

Q. Are you working for the Chesapeake & Ohio Railway Company?

A. Yes, sir.

Q. Are you still working for them?

A. Yes, sir.

Q. Were you acquainted with Mr. Con Dodson?

A. Yes, sir.

Q. How long have you known him?

A. I suppose it has been possibly five or six or maybe as many as ten years, in that neighborhood.

Q. You have been living up there in the same place that he lived and on the same work, were you not?

A. Where Dodson was?

[fol. 74] Q. Yes.

A. Yes, sir.

Q. Tell the jury what sort of a man Mr. Dodson was with reference to his temper and general disposition?

A. He was considered a quick tempered man, he was very quick in temper, he would take up little things sometimes that possibly wouldn't amount to anything much, he had that disposition and he was quick or nervous, or something, I don't know what the trouble really was, but he would fly off at little things that possibly wouldn't amount to anything much.

Q. He would take exception to little things you say?

A. Yes, sir.

Q. And was quick tempered?

A. Yes, sir.

Q. Did he, or not, get along with the men well that he worked with, or would he have little hitches with them?

A. He would have little hitches at times. Of course I never worked right direct with Mr. Dodson, but he had a little force up above me, I was below them ditching but I heard different men say about him.

By Mr. Stephenson: I am coming to that question.

By Mr. Perry: I object to that.

Q. Did you know generally the people that worked there on the force; and in the neighborhood that knew Dodson, you knew them, didn't you?

A. Yes, sir.

Q. You knew them well?

A. Yes, sir.

Q. And you know his general reputation as to whether or not he was quick tempered and an irritable man such as you have described and just what people thought of him, you know that?

A. Yes, sir, he was quick, no doubt about that.

Q. Now with the people that lived there with him, and worked with him, was that the general reputation he had amongst them, or not?

A. Yes, sir.

Q. There is no question about that, that was generally and commonly known by everybody?

A. Yes, sir.

[fol. 75] Q. He would fly up when there was no reason for a man flying up?

A. Yes, sir, lots of times he would.

Q. You say you were working along on a ditching job at the time, I mean previous to this killing, were you?

A. Yes, sir, previous to that.

Q. What time previous, a short time previous?

A. Yes, sir, just the day before this happened on Monday, I believe, and I was possibly called to the force on Friday or Saturday, I don't remember whether it was Friday or Saturday.

Q. Previous to that you had been working on the ditch?

A. Yes, sir.

Q. Did you work on that by yourself?

A. Alone by myself.

Q. But you were a part of the section crew?

A. Yes, sir.

Q. Now what was the practice with reference to the foreman hiring men on the job, the section foreman?

A. I don't know whether he had authority to hire, or not, I couldn't say about that.

Q. I am not asking you about authority, I say what did Mr. Long who was the foreman, generally do about hiring and firing men?

A. He had that power to hire and fire, Mr. Long did.
Q. Did he exercise it commonly and generally?
A. Yes, sir.

By Mr. Perry:

Q. You mean Mr. Long?
A. Yes, sir.

By Mr. Stephenson:

Q. That was the common practice?
A. Yes, sir.
Q. For a few days preceding the shooting of Bryant who was in charge of that section crew?

By Mr. Perry: Did you know; not what you heard now.
By Mr. Stephenson: I mean what he knows.

[fol. 76] A. You mean prior to the shooting?
Q. Yes, I mean three or four days immediately previous to the shooting, if you know who was in charge of the crew.
A. Dodson was in charge.
Q. Was there any other foreman in charge?
A. No, sir, I think not at that time.
Q. Mr. Long was away, wasn't he?
A. Yes, sir, he was sick I think.
Q. He had illness in his family or something?
A. Yes, sir.
Q. And previous to that period of three or four days when Mr. Long was away, had Mr. Long been away at other times, or not, on account of illness in his family, for a short time I mean?
A. Yes, sir, I think so.
Q. During a month, we will say, preceding the shooting of Marshall Bryant, had he been away at numerous times?
A. Of the same month?
Q. Yes.
A. I couldn't say, I don't remember that.
Q. I am not confining it absolutely to that month, I mean different times preceding that.
A. Yes, sir, at times he would be away.
Q. Then who was in charge in his absence?
A. Mr. Dodson had been looking after the men and kinda filling his place.

Q. And you have stated that one time Mr. Dodson had a force of his own?

A. Yes, sir.

Q. That was working separate and apart from Mr. Long's force?

A. Yes, sir.

Q. And was he working them at the same time that Long was working the other shift?

A. Yes, sir.

Q. Clearing off the right of way, I believe you said?

A. Yes, sir.

Q. Mr. Marshall Bryant lived there in the same neighborhood at Backbone, didn't he?

A. Yes, sir.

Q. His family lived there?

A. Yes, sir.

Q. How much family did he have?

A. A wife and two children.

[fol. 77] Q. Two small children?

A. Yes, one was a young baby.

Q. He had been working there on the section for sometime, hadn't he, or about how long?

A. I think Bryant must have came there sometime that summer.

Q. We will prove that by someone else, I don't know whether you know it or not.

A. I don't remember exactly what time he came there, no, sir.

Q. Was he a good hand to work?

A. Yes, sir, I considered him a good hand, a good able bodied man.

Q. You were present at the time of the shooting weren't you, or a part of it?

A. Yes, sir.

Q. Just tell the Court and jury what you saw and heard of it, at the time of the shooting?

A. This was on Monday morning. On Sunday we were at a wreck here at B. S. Cabin and coming in that evening we had wired our tools and kinda tied them together and we were ordered to load them on the train that evening and take them back to the toolhouse, so on Monday morning then there was a good many tools, several bunches of

them that was tied up together, and we was really fixing to leave the section house at that time and I said "won't you need those tools," and he said "yes, you better get them."

Q. Who was that?

A. Mr. Dodson. So I just stepped back in the toolhouse to get the tools and I found that they were wired up so I was down unloosening those tools at the time the talk was going on between him and Bryant, and the first words I heard was "get on away from here."

Q. You heard Dodson say that?

A. Yes, sir, and I continued to work with the tools, still I looked around to see who he had reference to, I didn't know who he had reference to, so at the time I got the tools loose then, and I don't remember what else was said at that time, but when I turned to start out of the toolhouse to the lever car with the tools I saw Dodson have a gun.

Q. What position did he have it in?

A. He had it up like this (indicating).

Q. Who was it pointed at?

A. At first I didn't really know because there was a crowd of men standing there, several of them, a good many of them standing there and I didn't know until Bryant spoke and said "What are you going to do with that," and I don't remember Dodson's remark, the thing caught me [fol. 78] uncertain and I don't remember the remark, but I know that Bryant said "I will make you eat that," so the shooting then started immediately.

Q. Immediately?

A. Yes, sir, immediately.

Q. Was Mr. Bryant at that time standing at the end of the car?

A. Yes, sir.

Q. And Mr. Dodson was over on the side?

A. Yes, sir.

Q. Like using this table, and that was the end towards Covington and Mr. Bryant was standing there at the end of the car and the other men were close around him?

A. Yes, sir.

Q. And Mr. Dodson was standing back here on the side, somewhere?

A. Yes, sir, near the upper end of the car.

Q. What was about the distance between the two men?

A. I hardly know what the length of those lever cars are, but they are not I don't suppose over five or six feet, or something in that neighborhood, but I wouldn't say positive.

Q. Do you think that was the distance between them, about?

A. Yes, sir, I could guess at it ordinarily, but I never measured one.

Q. How many men can stand on one of those cars and ride?

A. I have known them to have as many as ten or twelve, or maybe more.

Q. Now when that occurred, when you were attracted to it by hearing Mr. Dodson say to Bryant "I don't want you any more," I won't work you, or get away from here"?

A. Yes, sir.

Q. Your attention was then attracted to it, and you looked around and saw him with a gun?

A. Yes, sir.

Q. And you heard Bryant say, "What are you going to do with that?"

A. Yes, sir.

Q. And he said "he would make him eat it"?

A. Yes, sir.

Q. At that time was Marshall Bryant, the man who was subsequently shot, was he making any motion towards Mr. Dodson or attempting to attack him in any way whatever?

A. I didn't see any at all.

[fol. 79] Q. And you were where you could see?

A. Yes, sir.

Q. Did he make any move towards his pocket or anything of the kind to try to draw a weapon or anything of that sort?

A. No, sir, not that I seen.

Q. Was he standing there perfectly defenseless with his hands standing by his sides, is that true?

Objection. (Question withdrawn).

Q. What position was he standing in and how was he standing, I mean Mr. Bryant?

A. He was standing somewhat facing the car, he was at the east end of the car and Bryant was supposed to be at the west end.

Q. And where were his hands?

A. His hands seemed to be down like this (indicating).

Q. Did he at that time, or immediately afterwards or before, for that matter, have anything in his hands to hit Dodson with, or anything of that kind?

A. No, sir.

Q. Or attempt to take hold of anything?

A. He didn't have anything in his hands.

Q. You are positive of that?

A. Yes, sir, I am positive of that.

Q. Then you say immediately after that conversation which you have narrated, as to what Bryant said "what are you going to do with that, or I will make you eat it" Dodson commenced shooting?

A. Yes, sir.

Q. Was that the same Marshall Bryant that was taken away from there and taken to the hospital on that occasion and afterwards died?

A. Yes, sir, the same Bryant.

Q. These other men that have testified and are witnesses here were present at the time, weren't they?

A. Yes, sir.

Q. You have no interest in this matter?

A. No, sir—what do you mean?

Q. You have no interest in the outcome of this trial?

A. No, sir.

Q. You don't know Mr. Bryant's people at all, only what you saw of them there?

A. No, sir, I never saw them before, until he came there.

[fol. 80] Cross-examination.

By Mr. Perry:

Q. Before this thing happened how long had you been working for the railroad company?

A. Myself?

Q. Yes.

A. I suppose I had been there about nine years, or maybe before.

Q. And you always worked under Mr. Long?

A. Yes, sir.

Q. At the time when Mr. Long went away to see his mother, when his mother was sick, just before this shooting, did Mr. Long put you under Mr. Dodson or did you just continue to do what Long had told you to do?

A. I don't remember when he was away on account of his mother, but I suppose if it was anywhere close to that time, close to the time of the shooting, I don't suppose I was in the force because I was ditching along by myself.

Q. You were ditching by yourself, or for yourself?

A. No, sir, for the company, but I wasn't right in that force.

Q. You were not in the force that was silling?

A. No, sir.

Q. You were doing the same sort of work that Mr. Wright was doing?

A. Yes, sir, he was on one end and I was on the other.

Q. Who directed you to do that ditching work?

A. Mr. Long.

Q. You had nothing to do with Mr. Dodson at all?

A. Not a thing, no, sir.

Q. On the Monday when the shooting occurred it was your duty, I suppose, to go to the toolhouse and start out with the gang?

A. I had been ordered either on Friday or Saturday to come out with the gang.

Q. Who gave you that order, do you know?

A. Dodson told me that Mr. Long told him for me to come out with the force.

Q. Then Monday would be the first day that you would work with the force?

A. No, sir, I was there on Saturday and possible Friday, I won't say positively, but I know I was there on Saturday. [fol. 81] Q. Did you have any trouble with Dodson on Friday or Saturday?

A. No, sir.

Q. Dodson was a pretty good worker, wasn't he?

A. Yes, sir, he was a pretty good worker.

Q. Did you see Dodson have any trouble Friday or Saturday with Marshall Bryant?

A. No, sir.

Q. You didn't hear anything that took place between them on Saturday?

A. No, sir.

Q. Did you see them talking together, Bryant and Dodson, on Saturday?

A. No, sir, I did not.

Q. You spoke of Dodson having the reputation of being a quick tempered man, and flaring up over little things. Did you ever see him flare up over little things?

A. Yes, sir, I have.

Q. Tell me how.

A. He would take exception to most any little thing. Like the gang of men would be working and if they would stop a moment or anything like that, he would fly up and get angry.

Q. He would make them keep at work?

A. I couldn't say that he was so mean about that, but if there was anything touching him he would fly off.

Q. If they teased him he would fly off?

A. Just most anything and he would be that way with the foreman sometimes.

Q. Do you know anything about the relations between Bryant and Dodson, that is, whether they were friendly or unfriendly?

A. So far as I came to know anything——

Q. Not from what other people said now.

A. I won't state that then because I didn't hear any of that because I didn't happen to be with them.

Q. On the morning of the shooting you were leaning down in the toolhouse unwinding the wire from around the tools?

A. Yes, sir.

Q. And the first thing you heard was somebody that you supposed was Dodson telling somebody else to go on away from here?

A. Yes, sir.

Q. Was it in an angry voice, or how was it said?

A. He spoke it in this tone, he said "you get on away from here."

[fol. 82] Q. Did it sound as if he was angry, or not?

A. Yes, sir, it sounded like he meant it.

Q. But did it sound like a man that was very mad or a man that was just commanding somebody to go on away?

A. It was a strick command, I would take it.

Q. Was it just after that that you went out to see who it was?

A. After that?

Q. After you heard that?

A. When I heard this I was unloosening these tools.

Q. And you didn't go out until you got them loose?

A. No, sir.

Q. What did you hear next?

A. When I straightened up then, it wasn't much time, I just was unwinding the wires and was getting out when I first heard the remark, getting the tools loose, and there wasn't but merely a moment you might say.

Q. Did you hear Mr. Bryant say that Mr. Long had hired him and Long would fire him, or say anything about Mr. Long?

A. No, sir, I didn't hear that.

Q. Do you remember hearing Bryant tell Dodson that "I am going to give you what is coming to you today?"

A. No, sir, I didn't hear that.

Q. But you say that Dodson then pulled his gun?

A. Yes, sir.

Q. And you heard Bryant say "what are you going to do with that?"

A. Yes, sir.

Q. What did Dodson say to that?

A. I couldn't recall what Dodson said because I wasn't expecting anything and I didn't get every word of it.

Q. Then it was that Bryant said "I will make you eat that?"

A. Yes, sir.

Q. Did Bryant make any move then?

A. I didn't see any.

Q. He was facing Dodson?

A. Yes, sir.

Q. And the firing began right away?

A. Yes, sir.

[fol. 83] By Mr. Stephenson:

Q. You could have seen it if he had made any move?
A. Yes, sir.
Q. You were looking right at it?
A. Yes, sir.

Witness stands aside.

(At this point counsel for plaintiff read the deposition of Con. P. Dodson as follows.)

Con P. Dodson (by deposition).

Direct examination.

By Mr. Curry:

Q. Mr. Dodson, what is your age?
A. Forty-three the 5th of this coming December.
Q. Where did you live on the 31st day of August, 1925?
A. Backbone, Alleghany County, Va.
Q. How long had you lived there?
A. I had been there a little better than seven years.
Q. In whose employment were you on the 31st day of August, 1925?
A. C. E. Long was my superior.
Q. In whose employment were you at the time?
A. The C. & O. Railroad.
Q. How long had you been in the employment of the C. & O. Railroad Company at that time.
A. I had been there a little better than seven years.
Q. In what branch of the service were you employed?
A. In the maintenance of way.
Q. You were in the track hand service?
A. Yes, sir.
Q. Had you been in that service during the whole time you were employed by the C. & O.?
A. I had been on the carpenter force something like a year during that time. Of course, that had been quite a while before that.

[fol. 84] Q. What was your position in that service on the 31st of August?

A. I was acting as foreman at the time; had been for some time.

Q. How long were you assistant foreman?

A. I had been acting something like a year.

Q. Who was the chief foreman of your force?

A. Mr. C. E. Long.

Q. How many hands did you work under him?

A. I had around 25 at that time; between 20 and 25.

Q. During the year you acted as assistant foreman about what part of the time did you act as chief foreman?

A. Well now, Mr. Long was called away on Thursday evening—Thursday night on account of his mother being very low.

Q. Was that the only time you had acted as foreman?

A. No sir; I had a crew working at the time.

Q. What my former question was—you stated in your examination in answer to one of my questions that you had been acting as assistant foreman for about a year?

A. Yes, sir.

Q. What I want to know is during that year about what part of the time were you in command of a force of hands?

A. Practically all the time.

Q. Then do I understand that the force of hands which was employed there was divided and you worked some of them?

A. Yes, sir.

Q. And Mr. Long worked some of them?

A. Yes, sir.

Q. You worked, then, a divided force?

A. Yes, sir.

Q. Were you acquainted with Marshall Bryant?

A. Yes, sir.

Q. How long had you known Mr. Bryant?

A. I knew him for something like a year or better because he had been working there I suppose a year.

Q. Do you know whether Mr. Bryant had been discharged from the C. & O.'s service when he was mortally wounded?

By Mr. Perry: This question and any answer is objected to on the ground that the question is leading, that the witness is asked to state a conclusion of law, and that the wit-

ness' statements cannot bind the defendant in this case since they are made long after the occurrence.

Overruled. Defendant excepts.

[fol. 85] A. Yes, sir.

Q. When was he discharged?

A. He was discharged on Saturday.

By Mr. Perry: Same objection.

Overruled.

Q. On what day was the shooting?

A. On Monday morning.

Q. On the following Monday morning?

A. Yes, sir, the following Monday morning.

Q. Who discharged him from the C. & O.'s service?

A. I did myself.

Q. Did you have authority to do that?

By Mr. Perry: I object on the ground that the defendant cannot be bound by statements of this witness as to occurrences long prior to this time. His authority must be proven by other evidence.

Overruled.

A. Yes, sir.

Q. Did you have authority to hire and discharge hands?

By Mr. Perry: Same objection.

Overruled.

A. Yes, sir.

Q. Had you made any report to any officer of the company that you were going to discharge Marshall Bryant before you did actually discharge him?

A. Yes, sir.

Q. To whom did you report that?

A. The supervisor, Mr. L. E. Crance.

Q. Was he discharged or not with the approval of Mr. L. E. Crance?

By Mr. Perry: Objected to on the ground that the statements of this witness cannot bind the defendant, being made long after the occurrence in question.

[fol. 86] Overruled.

A. Mr. Crance made the remark—he said, "You know what to do."

Q. What is Mr. Crance's official position?

A. Supervisor.

Q. Of the C. & O. Railroad?

A. Yes, sir; Clifton Forge Division.

Q. What is the length of the division?

A. Clifton Forge to Hinton?

Q. Do I understand you to say that you discharged him then with the full approval of Mr. Crance?

A. Yes, sir.

Q. About what time of day did this shooting occur on Monday, the 31st of August?

A. About 7 o'clock.

Q. That was about the time that the force went to work?

A. Yes, sir; that was the hour they were to report.

Q. Did Marshall Bryant appear that morning to start to work?

A. Yes, sir.

Q. Did you tell him to leave or not?

By Mr. Perry: Objected to as leading.

Q. Did you say anything to him or not?

A. I told him I refused to work him, that I couldn't work him any more.

Q. Did you say anything to him or not about having discharged him on Saturday?

Mr. Perry: Objected to as leading

Overruled.

A. Yes, sir.

Cross-examination.

By Mr. Perry:

Q. What section of the railroad were you on?

A. I was—let's see——

[fol. 87] Q. The limits of it?

A. You mean the space of the track?

Q. Yes.

A. Four miles.

Q. You were on a four mile section right at Backbone, were you not?

A. Yes, sir.

Q. Had all of your work during your employment been in that section?

A. No, sir, I had been on the carpenter force.

Q. How long before this time had you been on the carpenter force?

A. I expect four years. I wouldn't like to say positive.

Q. About that?

A. Yes, sir.

Q. You were employed by Mr. Long, who was section foreman?

A. Yes, sir.

Q. The 25 men you spoke of were all on that particular section, were they not?

A. Yes, sir.

Q. They were your section force?

A. Yes, sir.

Q. What was your work? What did you do every day in the course of your work?

A. Well, it is the maintenance of way department. It would be quite a little job to mention everything a man has to go through with.

Q. You would see that the ballast was in shape, put new ballast on, replace ties, level track, clean the right of way—those were the principal duties, were they not?

A. Yes, sir.

Q. This force of 25 men that was being worked at that time was that the regular force or was that more than usual?

A. That was an unusually large force for the section.

Q. What work were you all doing during the preceding week?

A. We were silling.

Q. That is, putting in new ties?

A. Yes, sir; silling and shoving the track over; they were cutting and shoving the track over, reducing the curve.

Q. West of Backbone or east of Backbone?

A. West of Backbone.

Q. On the C. & O. railroad?

A. Yes, sir.

[fol. 88] Q. What work were you about to do that morning? The same work you had been doing?

A. No; we were going to lay steel.

Q. On the same section?

A. Yes, sir.

Q. How many men were to work with you that morning—August 31st?

A. I suppose if the crew had all come in it would have been around 20 to 25 men.

Q. Was your tool car on the track at the time the shooting took place?

A. Yes, sir.

Q. Whereabouts were you on the preceding Saturday when you discharged Bryant?

A. Right east of the tunnel.

Q. Was it after you came in from work and put up your tools or while on the section?

A. While I was out on the job.

Q. Now state just what occurred at that time?

A. I had pulled up my high rail and pulled the dip out of the west bound curve and gone back and pulled out the elevation. I picked up my level board and started off down the track. He walked up by the side of me and when I made my last pull I just said to the men, I said, "when you get that up bring your tools in and we will drop back." I walked down the track and he walked up beside me. He said "are you going to town this evening?" I said I had thought I would, and he just made the remark, he said "I want to see you when we get to the toolhouse. I am going to beat the hell out of you." I said "Marshall, I don't want any trouble with you," and I said "after this evening remember I don't work you any more." I said "You don't work any more after this evening."

Q. What was his reply?

A. He just made the remark, "if you cause me to lose my job, I will kill you."

Q. How long had you known Bryant?

A. He had been on the job something like a year.

Q. What brought this particular quarrel up at that time? Why did he come up to you? Had you had words with him?

By Mr. Curry: I object to the answer of the witness as this is not proper cross-examination of the witness and as to this line of examination the defendant is making this witness its own witness.

[fol. 89] By Mr. Perry: To which counsel replies that on direct examination the question was asked whether he had discharged Bryant and the circumstances of the discharge and these questions are competent if the preceding question on direct examination is competent.

Overruled. Plaintiff excepts.

A. Well, I feel that this man—I had to discharge another man that was working there, some relation to him, and he seemed to be kind of cool with me over that.

Q. Had you had any trouble about his work that day or the preceding day?

A. It seemed he was trying to create a disturbance with the other men. When I would say anything he would repeat it over after me.

Q. What did he tell you after you told him you wouldn't work him any more on this Saturday?

A. He told me—made the remark I have just given.

By Mr. Curry: Same objection.

Overruled.

Q. Was anything further said at that time?

A. No, sir; I never spoke another word to him.

Q. How long after that was it that you all went back to the toolhouse?

A. That was—must have been something like an hour or an hour and a half.

Q. Did anything further occur between you and Bryant that evening?

A. No, sir; not a word.

Q. When did you report to Supervisor Crance—Crance was supervisor, wasn't he?

A. Yes, sir. I did that right that afternoon while this work train was there. I think he left on the work train.

Q. The work train came along that evening?

A. Yes, sir.

Q. After this thing occurred; after this talk between you and Bryant?

A. No, sir.

Q. Before that?

A. Yes, sir.

[fol. 90] Q. And you then reported it to Crance, the Supervisor?

A. I made mention of it to him.

Q. Did I understand you to say that Bryant left on that work train?

A. Oh, no.

Q. Bryant went on back to the toolhouse?

A. Oh, no, I didn't say that.

Q. Did Bryant go on back to the tool house?

A. I couldn't say because I turned one of the keys over to one of the boys running the car, told him I wasn't going to the toolhouse, and I come off and walked on down to the house instead of going to the toolhouse as I had been usually doing.

By Mr. Curry:

Q. To your house you mean?

A. Yes, sir.

By Mr. Perry:

Q. Now tell me what occurred on Monday morning when you started off with your tool car?

A. He was getting his stuff out and I said, "Marshall, I have refused to work you any more."

Q. Had Bryant brought his tools or anything to the tool car at that time?

A. He went in the tool house and got a pick and brought it out. I said "I refuse to work you."

Q. Then tell what occurred.

A. He says "I don't pay no attention to you. Mr. Long will have to tell me."

Q. Who was Mr. Long? The regular section foreman?

A. Yes, sir.

Q. Go ahead and tell what happened.

A. He just made the remark, he said "I will give you what I promised you," and started on right around the car to me. When I drew my gun he said "what are you going to do with that damn thing? I will make you eat it."

Q. When he said "Mr. Long hired me and will have to

fire me," or words to that effect where was he standing? Where was Bryant standing?

A. He was coming around the car to me.

[fol. 91] Q. And you were on the track by the side of the car?

A. I was on the west bound side.

Q. The car was between you two?

A. It was at the time he first came out and he came right on around the east end of it.

By Mr. Curry: I object to each one of these questions.

Overruled.

Q. You say he had started to come towards you?

A. He was coming around the car to me.

Q. And said he would do to you what he had promised?

A. Yes, sir.

Q. What did you say?

A. I never said anything.

Q. What did you do?

A. I drew my gun.

Q. You came there that morning with a gun in your pocket?

A. Yes, sir.

Q. And you drew it. Did Bryant stop when you drew the gun?

A. No, sir.

Q. What did he do?

A. He just said "what are you going to do with that damn thing. I will make you eat it."

Q. What did you do then?

A. I put it to work.

Q. What size man was Bryant?

A. He was a man that weighed around 160 pounds.

Q. What height?

A. I don't just know. He was a man about my height.

Q. You are about 5 foot 8?

A. I couldn't say just what.

Q. Was Bryant a bigger man than you?

A. Yes, he was a heavier man.

Q. And what did you weigh around that time?

A. I weighed around 140 or 145.

Q. When you began to shoot was it to protect yourself or because you were mad with Bryant or what was it?

Objected to as leading and suggestive. Overruled. Exception.

[fol. 92] A. It was to protect myself.

Q. Did Bryant have anything in his hand at the time?

Objected to as leading. Overruled. Exception.

A. He looked to have a knife in his hand because his hand was right down at his side like that (indicating).

Q. How far away was he from you?

A. I was standing right at the lever of the car on the west bound side and he was coming around the end of the car.

By Mr. Curry. Same objection to each one of these questions.

Overruled.

Q. How long had you known Bryant before this occurred?

A. I just stated I had been working him pretty near a year, somewhere like a year.

Q. Who was his cousin that you had discharged?

A. A man by the name of Luther Snead.

Q. Bryant lived in that neighborhood, didn't he?

A. Yes, sir; somewhere close.

Q. You were no kin to him?

A. No, sir.

Q. You yourself were a married man?

A. Yes, sir.

Q. Lived with your wife and family?

A. No, sir.

Q. Where did they live?

A. Moss Run.

Q. That is five or six miles from Backbone?

A. No, sir; two miles.

Q. Was the section gang that you worked white men or negroes?

A. It was about three or four colored men in the gang.

Q. At the time you told Bryant on Saturday you wouldn't work him any more, was anybody else near you?

A. No, sir. We was walking down the track alone. The rest of the crew was back up the track.

[fol. 93] Redirect examination.

By Mr. Curry:

Q. Was there any notice required before discharging a hand?

A. No, sir.

By Mr. Perry: Objected to on the ground that the defendant is not bound by this reply at this time.

By Mr. Curry: I asked the question because Mr. Perry started to ask the witness whether or not five days' notice was required before discharging a hand and then withdrew it.

By Mr. Perry: To which counsel replies that the question was asked and immediately withdrawn for the reason that that counsel for the defendant thought it would be incompetent.

Overruled. Exception.

Q. Do I understand that the foreman had a right to discharge a man immediately if he wasn't satisfactory?

By Mr. Perry: Same objection.

Overruled. Exception.

A. Yes, sir.

Q. Now I understood you in chief to say that you told Bryant that he was discharged, that he couldn't work any longer for the C. & O. as a track hand on Saturday before the shooting?

A. Yes, sir.

Q. Now on Monday morning you say that he appeared for work? Did you tell him then you had discharged him on Saturday and told him he musn't come back?

By Mr. Perry: Objected to on the ground the witness has already stated what his language was.

[fol. 94] A. Yes, sir.

Q. As I understood your examination, you had no personal feeling against Bryant?

A. No, sir.

By Mr. Perry: Objected to on the ground this is a conclusion of a witness who has already stated what occurred.

Q. Did you recognize or not that you had the right to put him off the premises or require him to leave the premises after you discharged him?

By Mr. Perry: Objected to on the ground that this witness cannot say whether he had the right or be the judge of what the scope of his employment was, for that is a matter as to which he cannot bind the defendant, and further, it is a conclusion of law.

Objection. Sustained. Exception.

(The following answer was given outside of the hearing of the jury and for the purpose of record only: "Yes, sir.")

Q. Mr. Perry asked you whether or not you were living with your wife and you said you were not. Had you separated from your wife?

A. Yes, sir.

Q. How long had you been separated?

A. We had been separated pretty near two years.

Q. How far did she live from you at that time?

A. About two miles or two and a half.

Q. Did you have any children?

A. Had two.

Q. They were small children?

A. Yes, sir.

Q. I understand you had no ill feeling or hatred against this man Bryant?

A. No, sir, I did not.

[fol. 95] Recross-examination.

By Mr. Perry:

Q. If you didn't have any ill feeling against him why did you shoot him?

A. Well, except he made those threats I was just protecting myself.

And further this deponent sayeth not.

JOHN L. PIERCE recalled.

By Mr. Stephenson:

Q. Were you out with the crew on Saturday night and Sunday cleaning up the wreck? previous to the shooting?
A. Yes, sir.
Q. Who was in charge of the section force at that time that worked at Backbone?
A. I don't think Dodson was there on Saturday night but on Sunday morning he was, he had it in charge on Sunday.
Q. On Sunday he was in charge clearing up the wreck and you were present?
A. Yes, sir.
Q. Was Mr. Bryant along?
A. No, sir, he wasn't there.
Q. On either Saturday night or Sunday?
A. No, sir.

Witness stands aside.

E. C. THOMPSON sworn for plaintiff.

Direct examination.

By Mr. Stephenson:

Q. Your name is E. C. Thompson?
A. Yes, sir.
Q. You are the father of Taylor Thompson who has heretofore testified in this case?
A. Yes, sir.
[fol. 96] Q. Where do you live?
A. Backbone.
Q. Were you living there in 1925 when Marshall Bryant was shot?
A. Yes, sir.
Q. And you are still living there?
A. Yes, sir.
Q. Are you employed by the Chesapeake & Ohio Railway Company now?
A. Yes, sir.

Q. Were you then?

A. Yes, sir.

Q. Mr. Thompson, you are not connected or related to any of the parties here, are you, to Marshall Bryant or Mr. Dodson?

A. No, sir.

Q. You knew them both, did you?

A. Yes, sir.

Q. How long had you been employed by the Chesapeake & Ohio Railway Company at that time, on that section crew, I mean?

A. Going on two years, I guess.

Q. During that time had you known Mr. Dodson?

A. Yes, sir, he was there when I went there.

Q. Had you also known Marshall Bryant during the preceding year?

A. Yes, sir.

Q. And up to the time of the shooting?

A. Yes, sir.

Q. He had been there about a year, hadn't he?

A. Yes, sir, about a year.

Q. You were not present at the shooting though?

A. No, sir.

Q. What size man was Marshall Bryant and what was his weight?

A. I guess he would weigh about 145 or 150 pounds, I have an idea that he would.

Q. And about what size and weight man was Mr. Dodson?

A. I don't think there was much difference in the weight of them.

Q. Did you work there with Mr. Bryant?

A. Yes, sir.

Q. Was he, or not, a good hand, or a good worker?

A. Yes, sir, Bryant was a good hand.

Q. Who was the regular foreman there on that section?

A. Mr. Long.

[fol. 97] Q. Mr. C. E. Long?

A. Yes, sir.

Q. What position, if any, did Mr. Dodson hold previous to this time when Mr. Long was away?

A. I just don't know how long he was off, I never gave it a thought.

Q. Here is the question I am asking you. Did Mr. Dodson before the time that Mr. Long went away to visit his sick mother, or whenever that was, before that time, had Mr. Dodson been working a crew or the section men?

A. Yes, sir.

Q. Was that separate and apart from where Mr. Long worked?

A. Yes, sir.

Q. Do you know what they were doing?

A. They first commenced putting in some ties and then they went to cutting the right of way.

Q. And that crew was in charge of Mr. Dodson, you say?

A. Yes, sir.

Q. About when was it that Mr. Long was called away, about how long before when he was called away for a few days there at a time on account of his mother's illness, how long before Marshall Bryant was shot, was that?

A. I think, as well as I remember, it was three or four days probably but I just don't remember positively.

Q. Who was in charge of the section in his absence, of the whole crew of men there?

A. Mr. Dodson.

Q. Mr. Con Dodson?

A. Yes, sir.

Q. Did he go out with you and oversee the work and was he present at the work and did he direct it?

A. Yes, sir—now, I wasn't with the crew, I was flagging, I didn't work with the crew at all.

By Mr. Perry:

Q. You were flagging for that crew?

A. Yes, sir, they were laying steel and I was flagging.

By Mr. Stephenson:

Q. Did you see Mr. L. D. Crance, the Supervisor of Maintenance of Way man on this Division, from Clifton Forge west, did you see him there during the time Mr. Long was gone, one day?

[fol. 98] A. I seen him there on Saturday.

Q. Was he present where the section hands were working or where the crew was working?

A. Yes, sir, he was there with them.

Q. And Mr. Dodson was in charge?

A. Yes, sir.

Q. Now Mr. Thompson, I wish you would state whether Mr. Long, the regular foreman, hired the men and discharged them whenever he felt like it, when he was foreman, did he?

A. Yes, sir, I suppose so, he was the one that hired me.

Q. Do you know of him hiring and firing other men while you were there?

A. Yes, sir.

Q. And that is a fact and that was commonly done and that was commonly known as the practice of the railroad company, was it?

A. Yes, sir.

Q. While Mr. Long was gone the section crew continued under Mr. Dodson to do the regular work there on the section, did they?

A. Yes, sir.

Q. Were you out with the crew on Saturday night and Sunday?

A. Yes, sir.

Q. What was the work that they were called out to do at that time?

A. There was a wreck up here at B. S. Cabin.

Q. Was that wreck on the main line track?

A. Yes, sir.

Q. Right up here at B. S. Cabin, west of Covington, was it?

A. Yes, sir.

Q. Did that section crew remove that wreck?

A. They helped to do it, yes, sir, we were all there.

Q. Who was there in charge of them and directing them on that work?

A. Dodson.

Q. Was Marshall Bryant out on Saturday night or Sunday working on that wreck?

A. No, sir.

Q. Now Mr. Thompson, what kind of a man was Mr. Con Dodson with reference to his temper and disposition; tell the jury about that?

A. He was a pretty fiery man, that is what I call him, he was high tempered and he would fly up and get mad.

[fol. 99] Q. Did it take much or little to provoke him?

A. It didn't take much, no.

Q. He would fly up on slight provocation?

A. Yes, sir.

Q. Did that happen often?

A. Right often.

Q. Right often?

A. Yes, sir.

Q. Did he get along with the men that he worked with and did they work with him well, or not?

A. No, sir, I don't think he did.

Q. Besides being fiery and not being able to get along with the men, did he have other peculiarities?

A. He was a right peculiar man, I always thought.

Q. Just tell the Court and jury about that.

A. Well, he would get mad and wouldn't speak to you hardly ever at times and then again he would be just as friendly as he could be.

Q. Now you knew the people that he worked with and lived with commonly, didn't you?

A. Yes, sir.

Q. You knew them at that time?

A. Yes, sir.

Q. And did you know of his general reputation touching the characteristics that you have described amongst them, just what they thought of him, I say, do you know what they thought about that from general and common thought.

A. They said he was a mighty peculiar fellow.

By Mr. Perry:

Q. Do you mean they said that before the shooting or after the shooting?

A. They said it both times, before and after too.

Q. You heard it after the shooting?

A. Yes, sir.

Q. Did you hear it discussed before the shooting?

A. Yes, sir.

Q. How long before the shooting?
A. Ever since I have been up there.

[fol. 100] By Mr. Stephenson:

Q. Then you know his general reputation touching the characteristics you have described, just what people thought of him in that vicinity and the men that worked with him?
A. Yes, sir.
Q. Was that the general reputation that he had, that he was a fiery man and couldn't get along with people?
A. Yes, sir.
Q. He had a peculiar temperament?
A. Yes, sir.
Q. Was that commonly and generally known by everyone?
A. It was up there.
Q. And you had known it all the time he had been up there?
A. Yes, sir.

Cross-examination.

By Mr. Perry:

Q. Did you ever have any trouble with him?
A. No, I never had no trouble, to say any trouble, he got mad at me as well as he did the others.
Q. What did he get mad with you about?
A. You wouldn't know what he would get mad about.
Q. When did it happen?
A. It happened several times up there.
Q. Because you did something that he thought was wrong?
A. I suppose so, but I didn't know.
Q. What did he do when he got mad with you?
A. He just wouldn't speak to me.
Q. Was he a profane man or a cursing man?
A. No, sir.
Q. He would just stop speaking?
A. Yes, sir, as long as he was that way I wouldn't pay no attention to him, I wouldn't bother him, and then again he was all right.

Q. You say you were flagging on Thursday when Mr. Long left and Dodson took charge?

A. That was on Saturday.

Q. It was on Saturday?

A. Yes, sir.

Q. Do you know when Mr. Long did leave?

A. No, sir, I don't know what day it was.

[fol. 101] Q. You would go out with the gang in the morning?

A. I was flagging, yes, sir.

Q. You would start out from the toolhouse, wouldn't you?

A. Yes, sir.

Q. Yet you were not interested enough in who was boss up there or whether Dodson was boss on Thursday, Friday or Saturday, were you?

A. He was left as Foreman. Mr. Crance told Mr. Long to put him in.

Q. Don't say what somebody else said, or what somebody else told you, unless you heard it. Is this something you heard Mr. Crance say?

A. He taken the crew out.

A. Yes, sir.

Q. What day did he take them out first?

A. I just don't remember.

Q. It is in evidence here that he took them out first on Thursday before the shooting. You went out with them then, didn't you?

A. Yes, sir.

Q. And you went out with them on Friday?

A. I was out with them on Friday, yes sir.

Q. You were out with them every day?

A. Yes, sir, every day.

Q. Now did you see Dodson get mad on any of those three days?

A. I wasn't working with the crew.

Q. But you went out with them?

A. I didn't hear anything when we went out. When we went out they would send me with the flag.

Q. Still you would go out with the gang to the place where you were to flag and then you would do the flagging?

A. Yes, sir.

Q. And you would be right with Dodson until that time?

A. Yes, sir.

Q. Before that time were you with his gang that was cutting the grass off the right of way?

A. No, sir.

Q. When was it that he was cutting the grass off the right of way?

A. I don't remember what time they commenced cutting the right of way.

[fol. 102] Q. Do you remember what time they finished?

A. No, sir.

Q. Did you see him at work there?

A. Yes, sir, I would see them out there.

Q. You were working at different places?

A. I was working with Mr. Long.

Q. Dodson was being ordered around by Mr. Long wasn't he?

A. I suppose so, yes, sir.

Q. And you don't know anything about Dodson getting mad with the men?

A. They said——

Q. Not what they said, but what you saw and heard yourself?

A. No.

Q. You do not know that he turned off Luther Snead?

A. No, sir, I don't know anything only what they told me.

Q. You know that Luther Snead was a cousin of Marshall Bryant, don't you?

A. They said so, yes, sir.

Q. Do you know anything about the relations between Con Dodson and Marshall Bryant that week, whether they were friendly or unfriendly?

A. As far as I know they were friendly.

Q. And you hadn't heard anything between them on Saturday evening?

A. No, sir.

Q. Did you go back to the toolhouse with the men on Saturday evening?

A. No, sir, we started down town, down here to Covington, and got up to Moss Run and this wreck happened, and we came on down there.

Q. And Mr. Young, the Assistant Supervisor, was there in charge of you all that night, at the wreck, wasn't he?

A. Yes, sir.

Q. Mr. Dodson was not there that night?

A. No, sir, but he was there on Sunday.

Q. Was Mr. Young there on Sunday or Mr. Crance there on Sunday?

A. I guess they were both there, but I don't remember.

Q. On Sunday?

A. Yes, sir.

Witness stands aside.

[fol. 103] W. M. McDowell (col'd) sworn for plaintiff.

Direct examination.

By Mr. Stephenson:

Q. You go by the name of Jim?

A. No, sir, they just calls me that.

Q. Were you working on the section when Mr. Marshall Bryant was shot by Mr. Dodson?

A. Yes, sir.

Q. Were you present at the shooting?

A. Yes, sir.

Q. And had you been working there some time before that?

A. Yes, sir.

Q. You are working for the C. & O. Railway Co. now?

A. No, sir, not right now.

Q. Have you been recently?

A. No, sir, not since last fall.

Q. Just go ahead and tell the Court and jury what you heard of the controversy there between Mr. Dodson and Mr. Bryant, just what occurred?

A. When I got there, Mr. Dodson, he was there, and they were all there and were mighty near ready to go out, and Bryant he came down just in a few minutes, or as I was getting there he came on down to the car and Mr. Dodson said to him, he says "I aint going to work you any more," and I don't suppose that Mr. Bryant heard him, and he

went on to the toolhouse to get his tools out, his shovel and pick out of the toolhouse and came on back and laid them on the lever car, and then he picked up his dinner bucket and put it on the lever car and Mr. Dodson said to him "I told you that I wasn't going to work you any more," and Mr. Bryant said "why, what is that for?" and he said "I just told you I aint going to work you any more, just get on up the road," and he said "I will see Mr. Long," and he said "I done told you to get on up the road," and Mr. Bryant he just stood there a few minutes at the lower end of the lever car and then Dodson he said to him, "well, I done told you to just get on up the road, I aint going to work you," and then he reached and pulled his gun out.

Q. Dodson did?

A. Yes, sir, he pulled his gun out and I never knowed anything more, whether there was anything more said until when the shooting occurred.

[fol. 104] Q. He proceeded to shoot him then, did he?

A. Yes, sir.

Q. Did that happen in a short time?

A. Yes, sir, it wasn't very long.

Q. It wasn't very long happening after this talk started?

A. No, sir.

Q. Now where was Mr. Bryant standing with reference to the lever car?

A. He was standing at the east end of the lever car.

Q. Facing which way?

A. Down the track.

Q. Facing west, was he?

A. Yes, sir.

Q. And Mr. Dodson was where?

A. He was over kinda to the left hand side.

Q. The left hand side coming this way?

A. Yes, sir.

Q. Like this table was the lever car, Mr. Dodson would be here somewhere and Mr. Bryant would be at that end (indicating)?

A. Yes, sir.

Q. About how far apart do you think they were?

A. I don't know exactly, I couldn't say.

Q. Some several feet?

A. Yes, sir.

Q. Now while that was transpiring, or while that was going on, did Mr. Bryant there make any attempt to strike Mr. Dodson or reach for anything, or anything of that kind?

A. Not a bit as I seen.

Q. Did he have anything in his hand?

A. No, sir, nothing but his gloves on.

Q. He had put his gloves on like he was going to work?

A. Yes, sir.

Q. Where were his hands?

A. Swinging down at his side.

Q. And all you men were standing around there close around, you and the other witnesses who have testified here?

A. Yes, sir.

Q How long had you been working there with Mr. Dodson?

A. I worked in the gang——

Q. I mean on the section?

A. About two years.

[fol. 105] Q. About two years before that?

A. Yes, sir, about that anyhow.

Q. And Mr. Dodson and Mr. Bryant both had been working there during that time or practically all of that time, hadn't they?

A. Yes, sir.

Q. Mr. Dodson all the time?

A. Yes, sir.

Q. I wish you would tell the Court and jury what kind of a man Mr. Dodson was in regard to his temper and disposition?

A. Well, as far as I knowed of him he was a kind of impassioned, very quick, it didn't seem to take very much to throw him out of passion, he was nervous or something of the kind.

Q. Was that what was generally thought of him by the people in the community and by the men with whom he worked?

A. They all seemed to think that is what he was, as far as I know.

Q. That is the general reputation he had in the community in which he lived?

A. Yes, sir.

Q. And it was well known to everybody?

A. Yes, sir.

Q. Was he in charge of that section crew in the absence of Mr. Long on this occasion and for three or four days preceding the time he shot Mr. Bryant?

A. I wasn't out at the time, only that morning.

Q. You had not been working immediately preceding the shooting?

A. No, sir.

Cross-examination.

By Mr. Perry:

Q. How long before the shooting had you been working for the Company?

A. You mean with Mr. Dodson?

Q. No, for the company.

A. I disremember now exactly how long.

Q. A right good long time, wasn't it?

A. You mean with Mr. Bryant?

Q. No, I mean for the company?

A. I had been working with them about a year or pretty close on to it.

[fol. 106] Q. And you had been on that section all of that time?

A. Yes, sir.

Q. Had you ever worked with Mr. Dodson?

A. No, sir, but I worked with him one day I believe.

Q. Did you ever work in the same gang with him?

A. No, sir.

Q. The day you worked with him did you have any trouble with him at all?

A. No, sir.

Objection. Overruled.

A. Yes, sir.

Q. He was a good worker, wasn't he?

A. Yes, sir, he did all right in work.

Q. Was he a profane man or a cusser when he would get mad?

A. No, sir, I never did hear him swear at all.

Q. Did you ever see him when he got mad?

A. Yes, sir, I seen him several times when he would get kinda fretted.

Q. Tell the jury what he did and who he got mad with?

A. So many different ones of them, I couldn't tell exactly, who all he got fretted with.

Q. You say he would get fretted so often. Now tell me one case?

A. The only one I really remember of his getting fretted with was Jake Armentrout.

Q. That is the day he shot this man?

A. No, sir, it was one man that is in here now.

Q. Who did he get fretted with at that time?

A. Jake Armentrout.

Q. He got fretted with him?

A. Yes, sir.

Q. Was that in your presence?

A. Yes, sir.

Q. Did he curse Armentrout or strike him?

A. No, sir, he didn't curse him at all.

Q. Did he strike him?

A. We were taking the push car off the track one morning, so we got over on the edge of the fill and Jake let his end down, and it was time to set it down anyhow and Mr. Dodson he shoved it against him, and Jake asked him what did he mean by that, and he told him "I will shove you over the fill."

[fol. 107] Q. Was that the end of it?

A. Jake told him "no he wouldn't."

Q. That is all that was said?

A. Yes, sir.

Q. How long was that before the shooting?

A. About two or three months I guess.

Q. Did Armentrout keep on working then?

A. Yes, sir.

Q. Worked for Dodson?

A. Yes, sir. I disremember now, I don't say he was working for Mr. Dodson at the same time, because I think Mr. Long was there, but he wasn't right with us, not right at the time.

Q. That happened because they were pushing against each other?

A. No, sir, they weren't pushing against each other at all, Jake got to the fill and he just set his end down and Mr. Dodson pulled his end over against his, right against

the side of his leg and Jake asked him what he meant to do and he said "I will push you over the fill," and Jake told him "no, he wouldn't."

Q. On the morning of the killing do you remember at all where you were standing?

A. I was standing at the upper end of the lever car, kinda on the side of it.

Q. You were standing on the opposite end of the lever car?

A. Kinda between the tracks, the east track and the west track.

Q. You were standing on the opposite end from Mr. Bryant?

A. Yes, sir.

Q. Did you stay there after the shooting began or did you leave?

A. Yes, sir, I stayed right there.

Q. Were you in line of the fire at all?

A. About the last shot, the way he throwed his gun around it came pretty close to me.

Q. That was about the last shot?

A. Yes, sir.

Q. And you were on the other side of the car from Bryant?

A. He was over on this side and I was over on this side (indicating), but he was shooting kinda down that way (indicating) and I was over like this (indicating).

Q. Do you remember hearing Bryant say "Now I will give you what is coming to you?"

A. No, sir.

[fol. 108] Q. Do you remember hearing Bryant say "I will make you eat that gun up?"

A. No, sir.

Witness stands aside.

C. B. Alfred sworn for plaintiff.

Direct examination.

By Mr. Stephenson:

Q. Mr. Alfred, have you worked for the Chesapeake & Ohio Railway Co.?

A. Yes, sir.

Q. And had you worked for them previous to the time that Mr. Bryant was shot and killed on the Backbone section?

A. I was working at Low Moor at that time.

Q. I mean sometime previous you had worked there, hadn't you?

A. Yes, sir.

Q. Did you know Mr. Con Dodson?

A. Yes, sir.

Q. Had you worked with him and for him?

A. No, sir, I never worked with him but I worked close to him though.

Q. You mean on the same shift?

A. No, sir, I was on one shift and he was on the other.

Q. You mean the same crew?

A. He was on the night shift and I was on the day shift.

Q. On the section crew?

A. Yes, sir.

Q. How long had you worked up there on that Backbone section?

A. I don't know, I worked there a good while though.

Q. While Mr. Dodson was there?

A. Yes, sir.

Q. I wish you would tell the Court and jury what kind of a man Mr. Dodson was with reference to his temper and disposition?

By Mr. Perry: I would like to ask him a question in regard to the competency of this evidence.

[fol. 109] By the Court: Go ahead.

By Mr. Perry:

Q. You say you did not work with Mr. Dodson?

A. No, sir.

Q. You worked at night and Dodson worked in the daytime?

A. No, sir, I worked in the daytime.

Q. And Dodson worked at night?

A. Yes, sir, and I had to relieve him every morning.

Q. Did you ever work alongside of Dodson?

A. Yes, sir.

Q. When was that?

A. That has been several years ago, when I first came to this country, when they had wrecks up there and we would have to go to them, I was working at Callahan.

Q. When did you come to this country?

A. Sir?

Q. You say when you first come to this country; when did you first come to this country?

A. In 1912.

Q. That was 14 years ago?

A. Yes, sir.

Q. What was Dodson doing for the railroad company then?

A. He was working for Mr. Long, I think.

Q. 14 years ago?

A. Yes, sir, he was working for Mr. Long.

Q. He was working for Mr. Long on that section 14 years ago?

A. In 1912.

Q. Did you work with Dodson or alongside him?

A. I didn't work with him but I worked by the side of him.

Q. How long?

A. Until we would get the wreck up.

Q. You were working on the wrecking crew?

A. No, sir, I was working at Callahan and they would have a wreck and they would gather up all the crew and take them to the wreck.

Q. You were on another section?

A. Yes, sir.

Q. And the only time that you would work with Dodson was whenever there would be a wreck. Is that right?

A. That is the only time, until I went to work with Mr. Long.

[fol. 110] Q. And when you worked with Mr. Long you worked on the day force and Dodson was on the night force?

A. Yes, sir, he went to work at 11 o'clock and I went to work at seven o'clock the next morning and relieved him.

By Mr. Perry: If your Honor please, I object to this man's evidence.

By the Court: I don't know how much time a man would have to stay on a job to find that out. I think he can testify what Mr. Dodson's temper and disposition was if he saw it.

By Mr. Perry: It probably goes to the weight of his evidence.

By Mr. Stephenson:

Q. You say you did work with him way back there when you first knew him several years ago?

A. Yes, sir.

Q. Now I want you to tell the Court and jury what kind of a man, what kind of temper and disposition Mr. Dodson had?

A. He had a very mean one, he was a man that couldn't get along with nobody, it looked like you couldn't speak right, nobody he had working with him, and he had a way that nobody liked, he didn't know how to speak to you when he talked to you.

Q. Now were those characteristics that you have described, were they commonly known by the people in the community?

A. Yes, sir.

Q. By the people that worked with him and knew him?

A. Yes, sir.

Q. And was that, or not, his general reputation about those matters?

A. Yes, sir, that is his reputation with everybody.

Q. And everybody knew that?

A. Yes, sir.

Q. Will you please state what authority the Chesapeake & Ohio Railway Company foreman exercised with reference to the question of hiring and discharging men?

A. Every gang that I ever worked in, they had privilege of hiring and firing his own men.

[fol. 111] Q. And you have worked for the railroad during the last many years?

A. Yes, sir.

Q. At many different places, up and down the railroad?

A. Yes, sir, all over Greenbriar.

Q. And that is the common practice?

A. Yes, sir, for a man to hire and fire his own men, all that I ever worked for.

Cross-examination:

By Mr. Perry:

Q. Mr. Alfred, did you have any trouble with Dodson?
A. No, sir.
Q. You say he didn't know how to speak or talk to you. Did he speak to you all right?
A. No, sir.
Q. When did he speak wrong to you?
A. Up there one day I went after a plank, a crossing board to wheel across and he got mad because I took it.
Q. You started to do what, I didn't understand you?
A. Sir?
Q. What did you say you did?
A. I went after a crossing board to wheel dirt across the track and Mr. Wright had put a board there, he had nothing to do with it, but he was sitting on it, and I went and got the board and Mr. Wright told me where it was at and I went and got the board and he got miffed at me.
Q. What did he say to you?
A. He didn't say but very little to me. I told him I got the board and he sent the men word not to take it and I went and took it, and I told him it was the only board that I had to get as I had no other place to get one and I went there and took it and he said I had no right to take it and he went to Mr. Long about it, but I didn't care anything about it.
Q. He complained to Mr. Long?
A. Yes, sir.
Q. He didn't cuss you or say anything to you, did he?
A. No, sir.
Q. Did you ever have any other trouble with him?
A. No, sir.

[fol. 112] Witness stands aside.

Frank Alfred sworn for plaintiff.

Direct examination.

By Mr. Stephenson:

Q. Mr. Alfred, where do you live?
A. In the east end of Covington.

Q. You are a son of Mr. Alfred who has just testified?

A. Yes, sir.

Q. Have you worked on the Chesapeake & Ohio Railway as a section hand during the past year?

A. Yes, sir, I worked on the railroad generally since I was 16 years old.

Q. I mean previous to 1925 when Marshall Bryant was killed, had you worked along here at Backbone and other places?

A. I worked for Mr. Jim Kelly.

Q. Have you also worked for Con Dodson or on the same shift he was on?

A. I worked with him with Mr. Long.

Q. How long were you working with him?

A. I worked up there two summers with him.

Q. You knew him very well then, did you?

A. Yes, sir.

Q. What kind of a man was Mr. Con Dodson with reference to disposition and temper?

A. He had a right bad temper I thought, he was right mulish like, and it didn't seem like he got along with anybody much, you couldn't *place* him no way.

Q. You say he couldn't get along with other people well?

A. No, sir.

Q. He didn't have the faculty of getting along with people or handling men?

A. No, sir.

Q. Is that the general reputation he had amongst the men?

A. Yes, sir.

Q. And in the community that knew him?

A. Yes, sir.

Q. There is no question about that?

A. No, sir.

[fol. 113] Q. Now these peculiarities of temper that you have described, what kind of things would they develop over small matters?

A. Yes, sir, small matters, it looked like he would get mad at little or nothing.

Q. Were they frequent?

A. Yes, sir.

Q. And well known to all the men?
A. Yes, sir.

Cross-examination.

By Mr. Perry:

Q. Did you ever have any trouble with him of any sort?
A. No, sir.
Q. And you worked with him for two summers?
A. Yes, sir.
Q. Were you in this gang that was cleaning up the right of way and cutting the grass and weeds?
A. No, sir.
Q. Where did you work?
A. I worked in the gang with him for Mr. Long when he was working as a hand just the same as I was.
Q. That was last summer that you worked there with Dodson?
A. He killed Bryant in 1925.
Q. That was the last summer you worked, or when was the last summer you worked?
A. I think 1923 was the last work I done.
Q. And he was working there as a hand then?
A. Yes, sir.
Q. And did you work in 1922 or 1921?
A. No, sir, I think it was—dogged if I know, it might have been 1922, I don't know whether it was or not.
Q. In reference to this bad temper, can you remember any occasions that he showed bad temper and can you tell the jury about that?
A. He would get mad with the men up there and wouldn't speak to nobody.
Q. He just wouldn't speak to them?
A. He just would get mad at anything.
Q. He wasn't a cusser or a profane man?
A. No, sir, he didn't cuss.
[fol. 114] Q. He was not a fighting man?
A. I never knowed him to be in no fight.
Q. He would get insulted and wouldn't speak to them?
A. Yes, sir.

Witness stands aside.

JAKE A. ARMENTROUT sworn for plaintiff.

Direct examination.

By Mr. Stephenson:

Q. Where do you live?
A. Callahan.
Q. Your home is there, is it?
A. Yes, sir.
Q. Are you acquainted with Con Dodson?
A. Yes, sir.
Q. Did you ever work with him?
A. Yes, sir, I have worked with him.
Q. About when did you work with him?
A. I just don't remember when it was that I worked with him but it has been about two or three years ago, I guess.
Q. Had you known him for sometime previous to that?
A. Yes, sir.
Q. You live at Backbone or Moss Run, don't you?
A. Between Moss Run and Callahan.
Q. That section runs along there, doesn't it?
A. No, not along there it doesn't.
Q. I mean the Backbone section?
A. West of Moss Run.
Q. And you live near Moss Run?
A. Yes, sir.
Q. Where did Dodson live?
A. At Backbone.
Q. That is only a short distance from Moss Run, isn't it, a couple of miles?
A. Yes, sir, about a couple of miles.
Q. And had you known him then most of the time that he had been up there working for the railroad company?
A. Yes, sir, I had.
[fol. 115] Q. You were raised there?
A. Yes, sir.
Q. Now I want you to tell the Court and jury what kind of a man Mr. Dodson was with reference to his disposition.

By Mr. Perry: Ask him what his opportunities were for knowing.

By Mr. Stephenson:

Q. Did you work with him and see him frequently while you were working there?

A. While I was working there.

Q. Yes, sir?

A. Yes, sir, I worked with him.

Q. And previously to that you had known him there at his work and had seen him at work?

A. Yes, sir.

Q. What was his disposition and temper and how did he get along with the other men, I want to ask you that question, tell the Court and jury about that?

A. I couldn't answer it further than I didn't get along with him so very well myself.

Q. I wasn't asking particularly how you got along with him, but how he got along with the men generally. Did he have friction, or not, with them?

A. Yes, sir, he did.

Q. Did he have that general reputation amongst the men he worked with and the men that knew him, that he was a man that couldn't get along with other men and had fits of temper?

A. I don't know.

Q. Sir?

A. Yes, sir, he was a fellow that couldn't hardly get along with anybody any way. If you done to suit him it would be all right.

Q. And if you didn't, it wasn't?

A. Yes, sir.

Q. And was that known in the community, I mean among the people that worked with him and knew of him, and is that what they commonly thought of him?

A. Yes, sir, I think so.

[fol. 116] By Mr. Perry: He only knew what his own experience was. He said he didn't know what the men said about him.

By Mr. Stephenson: He didn't say that.

By the Court: I am inclined to think that Mr. Armentrout has not stated that he knew what the men generally said about Dodson, and the foundation ought to be laid before he can testify to what his general reputation was.

By Mr. Stephenson:

Q. Mr. Armentrout, do you know what was generally thought of Mr. Dodson by the people with whom he worked and who knew him there with reference to the question of his general disposition and temper, do you know that, not from what you know, but from what people generally knew about it, do you know it, or not?

A. Well, no, I don't know it.

Q. All right, then I won't ask you about it?

No cross-examination.

Witness stands aside.

STIPULATION RE ADMINISTRATOR

It is admitted that the plaintiff duly qualified as administrator of Marshall Bryant, deceased.

Mrs. MARSHALL BRYANT sworn for plaintiff.

Direct examination.

By Mr. Curry:

Q. I believe you are the widow of Marshall Bryant, deceased?

A. Yes, sir.

Q. What is your age?

A. I will be 24 years old the first day of August coming.

Q. And when was your husband born?

A. He was born in 1902.

[fol. 117] Q. What time in 1902?

A. May 22nd, 1902.

Q. He was born May 22nd, 1902?

A. Yes, sir.

Q. And how many children have you by Mr. Bryant?

A. Two.

Q. How old are the children and when were they born?

A. The oldest one was born, well, he was four years old the 6th of January past.

Q. And he was then just a little over two years old when your husband was killed?

A. Yes, sir.

Q. And how old was the baby when he was killed?

A. He was four months old.

Q. Are they boys or girls?

A. Both boys.

Q. What are their names?

A. Mason Henry is the oldest one.

Q. What is the name of the other?

A. Arthur Lee.

Q. What is your name?

A. My name is Orie.

Q. Did your husband leave any estate?

A. No, sir.

By Mr. Perry: I ask that the last question and answer be stricken out.

By the Court: I think so. It is immaterial.

By Mr. Perry: I do not care to cross-examine Mrs. Bryant and I want to recall E. C. Thompson.

By Mr. Curry: I want to offer the Standard Mortality Table, but I can do that later on.

Witness stands aside.

E. C. Thompson recalled.

By Mr. Perry:

Q. Mr. Thompson, did you see Mr. Bryant that morning before he went to the toolhouse?

A. Yes, sir.

[fol. 118] By Mr. Perry: I want to ask a question, if your Honor please, and I am pretty sure it will be objected to and I would rather ask it when the jury is not here to see what your Honor will do about it.

By the Court: Let the jury retire.

(Jury retires from Court room.)

By Mr. Perry:

Q. State whether or not you had any conversation with Mr. Bryant on Monday morning that he was killed before

he went to the toolhouse, in regard to a quarrel or misunderstanding between Bryant and Dodson, if so, what that conversation was?

By Mr. Stephenson: We object to the question on the ground that it is impertinent to the issue and irrelevant.

By the Court: Of course a conversation upon any subject might be.

By Mr. Perry: I have stated what the subject was.

By the Court: Read the question. (Question read to Court.)

By the Court: I think it is admissible.

By Mr. Perry:

Q. Answer the question, you did have such a conversation?

A. Yes, sir, I was talking with Mr. Bryant the morning he came down, he stopped at my house on the railroad and we had a few words, I just don't remember what we were talking about but he said "well, I will go on down, I guess Dodson will fire me this morning."

Q. What else?

A. I asked him "why," and he said "that Dodson had been talking about him, and he told him if he didn't quit [fol. 119] talking about him that one or tother of us would have to take a whipping," and Dodson just made the reply "all right fellow, I have got the difference in my pocket."

(Jury returns into Court room.)

By the Court: Gentlemen of the jury, this question and answer was asked Mr. Thompson during your absence and the question will now be read and his answer will be read as if it had been asked in your presence and answered in your presence.

(Said question and answer was here read to the jury.)

Witness stands aside.

By Mr. Curry: We will rest, with the exception of putting the Standard Mortality Table in.

By the Court: Very well, we will adjourn until tomorrow morning.

(Court adjourns until tomorrow morning.)

Thursday, April 28th, 1927, Morning Session

STIPULATION RE EXPECTANCY OF LIFE

It is agreed by counsel for both sides that the expectancy of life of the deceased, Bryant, is 40 years, according to the Standard Mortality Table.

By Mr. Perry: Now I want to recall Taylor Thompson.

TAYLOR THOMPSON recalled.

By Mr. Perry:

Q. Mr. Thompson, you testified on yesterday?
A. Yes, sir.
Q. Did you see Bryant on the morning before he was killed, before he went to work?
[fol. 120] A. No, sir, I didn't see him I don't think.
Q. Did you have any talk with him at all between Saturday evening and Monday morning?
A. No, sir.
Q. In regard to his work or in regard to Dodson?
A. No, sir, I never saw him at all until Monday morning when he went to work.
Q. Did you see him before he went to work on Monday morning?
A. No, sir, I never saw him until he came to work on Monday morning.
Q. And you had no private talk with him at all?
A. No, sir.

By Mr. Stephenson:

Q. Was Marshall Bryant a healthy young man?
A. He looked to be pretty healthy.
Q. He was a man that worked regularly and was a healthy man, wasn't he?
A. Yes, sir, he looked to be a healthy man and he worked pretty regularly.
Q. He was a young, active, industrious man, was he?
A. Yes, sir.

Q. Did you know of your own knowledge what he got per day for his labor?
A. Yes, sir, he got 37¢ per hour or $2.96 per day.
Q. You know that of your own knowledge, do you?
A. Yes, sir.

By Mr. Perry:

Q. For an eight-hour day?
A. Yes, sir.

Witness stands aside.

Dolph M. Wright sworn for plaintiff.

Direct examination.

By Mr. Stephenson:

Q. Mr. Wright, do you know Mr. J. E. Long, the section foreman?
[fol. 121] A. Yes, sir.
Q. You worked on the section, with him, did you not?
A. Yes, sir.
Q. Did you have a conversation with Mr. J. E. Long sometime around about the time of the shooting of Marshall Bryant, somewhere on the tracks there while you were working, with reference to the question of Mr. Dodson and whether or not he was a nervous man, if so, just state what the conversation was?

By Mr. Perry: Was that before the killing?
By Mr. Stephenson: The conversation may not have been.

Q. You understood the question, didn't you?
A. Yes, sir.
Q. Just state what Mr. Long said to you about that?

By Mr. Perry: I object to anything Mr. Long said. What this witness may have told Mr. Long is competent evidence, but the railroad company cannot be bound by admissions of its agents, but what the witness told Mr. Long is a different thing.
By Mr. Curry: Not what this witness told him, but what Mr. Long told him.

By Mr. Perry: We cannot be bound by any statement of an agent.

By the Court: Any declarations made by a servant or employee of the railroad company, either before or after, is not binding.

By Mr. Curry: That is ordinarily true, there is no doubt about that, but you know Mr. Long was his superior and Mr. Long was an agent of the C. & O. to employ people and did employ them and he employed Dodson. Now on one branch of our case we rely upon the theory that the railway company was negligent in employing Mr. Dodson and the theory that he was a nervous man and an incompetent person, and that is the theory upon which we asked the [fol. 122] question and that was to bring notice home of the kind of man that Mr. Dodson was. We charge in our declaration that the company was negligent in putting this man in charge of the hands and that they knew or ought to have known by the exercise of ordinary care that he was an incompetent and improper person to be put in charge of hands, and that is what we want to show, that that was brought home to Mr. Long, that was the purpose of it.

By the Court: The question here is whether or not Dodson was a suitable person and whether the railroad company had notice of what sort of man he was.

By Mr. Curry: Or might have had notice.

By the Court: Or might have had notice. The evidence in the case so far tends to show that Mr. Long delegated Dodson as foreman, but what his authority was in that respect, what Mr. Long's authority in that respect does not appear.

By Mr. Stephenson: He was authorized by Mr. Crance, who was the supervisor of Maintenance of Way.

By the Court: I think if the plaintiff can show that Mr. Long was advised of what sort of man Mr. Dodson was and that they can show that Mr. Long regarded him as an improper person he ought to be allowed to do it by statements made by Mr. Long.

Defendant excepts.

By Mr. Stephenson:

Q. Read the question.

(Question read to the witness.)

A. Mr. Stephenson had a misunderstanding of me, this was after the shooting.

By Mr. Perry: He says it was after the shooting and certainly no admissions after the shooting is proper.

By Mr. Curry: Any admission afterwards is just as good as before.

[fol. 123] By Mr. Perry: By an agent?

By Mr. Curry: That he knew. This man was arrested immediately.

By the Court: There is a good deal of doubt about that. Statements made by an employee of a railroad company after the occurrence which is being investigated.

By Mr. Curry: That is an admission that he knew. He was acting as the agent of the railroad company in employing the hands, and the evidence here shows or tends to show that he employed Dodson.

By the Court: I have a great deal of doubt about it, but if you want to take the risk you can do so. You are purposing showing a statement made by Mr. Long with reference to the characteristics of Mr. Dodson, which statement was made after the occurrence which is the subject of investigation here. Go ahead I will let you ask the question. The purpose of your question is to show Mr. Long knew that Mr. Dodson was not a proper foreman.

By Mr. Curry: That is the purpose of it.

By the Court: Go ahead, but I have some doubt about it.

Defendant excepts.

By Mr. Stephenson:

Q. Just state what Mr. Long said in that conversation?

A. He didn't altogether make it just to me, but he made it to several that Mr. Dodson was kinda nervous and that he shot through the window maybe once, that is all that I paid any attention to.

Q. What did he say about him shooting?

A. That he heard a noise and that he was kinda nervous and scary like and that he just shot through the window.

Q. He would shoot through the window?

[fol. 124] By Mr. Perry: He didn't say that he would shoot through the window but that he had shot through the window. That is what you said isn't it?

A. Yes, sir.

By Mr. Stephenson:

Q. Did Long and Dodson live in the same house there at Backbone together or near Backbone?

A. They stayed together over there where Dodson lived.

Q. They occupied the same house?

A. Yes, sir.

Q. Whose house was that?

A. That was Dodson's house.

Q. And Long, the foreman, lived there?

A. He stayed there.

Q. And he was narrating to you what had happened in that house, was he?

A. Yes, sir.

Q. That had happened before the shooting, wasn't it, the occurrence that he talked about?

A. The shooting of Bryant?

Q. Yes, sir.

A. No, sir, it was afterwards.

Q. I am not talking about the conversation, but I am talking about the shooting that had taken place before. This incident that he was telling you about, about his nervousness and about his shooting in the dark, it happened previous to the shooting of Marshall Bryant. Is that correct, or not?

A. Yes, sir.

Q. That is correct?

A. Yes, sir.

Q. And I understand you to say that he said in that conversation that he would just shoot out in the dark at anything he heard.

By Mr. Perry: He didn't say that, he said he had shot, but he didn't say that he would shoot at anything.

By the Court: The jury heard what he said.

[fol. 125] By Mr. Perry:

Q. Where was this conversation?

A. This was down there on the track where we were working.

Q. After the shooting?

A. Yes, sir.

Q. How long after the shooting?

A. I don't know exactly just how long it was.

Q. Was it after Dodson had been tried?

A. Yes, sir.

Q. And just what was it that Mr. Long said?

A. That Mr. Dodson was kinda nervous, that he just shot out of the window and was scary like.

Q. Did he state why he shot out of the window?

A. No, sir, I never paid any attention much to it.

Q. Did he say anything about Dodson having thought that somebody was out there, or something of that sort?

A. Yes, sir, I believe he did say that.

Q. Just what was that?

A. He said when he heard anything.

Q. He did say that when he shot out of the window?

A. Yes, sir, at night.

Q. Or when did he say that he shot out of the window?

A. At night.

Witness stands aside.

TAYLOR THOMPSON recalled.

By Mr. Stephenson:

Q. You have heretofore testified in this matter?

A. Yes, sir.

Q. You know Mr. Long, of course, the foreman there, don't you?

A. Yes, sir.

Q. Did you hear him discussing the matter as to Mr. Con Dodson and what he did with a gun around the house on one or more occasions?

Same objection. Overruled. Exception.

A. Yes, sir, I heard him say that Mr. Dodson got up one night, he heard a racket around the house and he shot two

[fol. 126] or three times, maybe three, through the screen on the window and he said it was dangerous for a man to be around the house over there that Dodson would just shoot whenever he heard a racket and that he got up that night and shot through the screen.

By Mr. Perry:

Q. When did he say that?

A. That was right after he shot Bryant, that was the next day, I think.

Q. When did Long say this?

A. He told us out there on the track the next day after he done the shooting through the screen?

Q. The next day after he shot through the screen?

A. Yes, sir, he told about it a day after Bryant had been shot.

Q. When was it that he shot through the screen?

A. I don't remember the date, but it was one night is all I remember that he shot through the screen and I saw the holes through the screen.

Q. How long was that before he shot Bryant?

A. I expect a week or so, I don't remember just how long.

Q. A week or so before he shot Bryant?

A. Yes, sir.

Q. Was Dodson present at the time?

A. Dodson, he was working a bunch of men on the upper end of the section, he wasn't in our gang.

Q. How did Long come to tell you that?

A. I don't know, he just happened to think about it and told us about it.

Q. You had a conversation, didn't you, with Marshall Bryant on Saturday evening, about Marshall Bryant's relations with Dodson, didn't you?

A. No, sir, I didn't talk with Marshall Bryant only when I was working with him.

Q. You heard Marshall Bryant make a statement on Saturday evening about trouble with Dodson?

A. No, sir, I did not.

Q. You did not hear Marshall Bryant say anything about Dodson?

A. No, sir, not to me.

Q. Didn't you hear him say that Dodson had been talking about him?

[fol. 127] By Mr. Stephenson: We object to that. He is making this man his own witness on that point and he cannot cross-examine him.

By the Court: He has a right to do that, if he wants to make him his own witness.

By Mr. Stephenson: But he cannot cross-examine him and that is what he is doing. He cannot make him his own witness and cross-examine him at the same time.

By the Court: I don't know whether you can call that cross-examination, or not. He is asking him questions in a rather abrupt manner.

By Mr. Stephenson: The witness has denied the transaction and he is trying to force something out of him.

By the Court: I do not think you can contradict him.

By Mr. Perry: I am not going to contradict him.

Q. Didn't Bryant tell you that he and Dodson had had some words and that if Dodson didn't stop talking about him one or the other of them were going to take a whipping?

Objection. Overruled. Exception.

Q. Answer the question.

A. I don't remember that, if he asked me that, he might have asked me, but I don't remember it now.

Q. He might have told you that?

A. I don't remember it if he did.

Q. You did remember it at one time, didn't you?

A. If I did remember it once, I don't now.

Q. Didn't Bryant tell you words to that effect?

A. I don't remember that I talked to Bryant except just through the work that day.

Q. Didn't you hear Bryant say words to that effect?

A. I haven't got any recollection of it at all.

[fol. 128] By Mr. Stephenson: We move to strike that evidence out on that point.

By the Court: I think the motion ought to be sustained. Mr. Perry, counsel for the railroad company says he does not purpose attempting to contradict this witness and the questions and answers in reference to a supposed conversation that he had with Bryant on the day before the shooting may be stricken out.

By Mr. Stephenson:

Q. Now Mr. Thompson, I had not finished examining you when Mr. Perry interrupted me.

By Mr. Perry: I beg your pardon.

By Mr. Stephenson:

Q. The conversation which you had with Mr. Long about Dodson, Long saying that Dodson got up in the night and shot out through the screen, was on the day immediately after that occurred. Is that right?

A. Yes, sir.

Q. Immediately after the shooting occurred through the window?

By the Court: He has already answered that question and I am not going to permit any repetitions.

By Mr. Stephenson: The only reason I am asking it is because Mr. Perry took the witness away from me and I had not had an opportunity to ask him that.

By the Court: He had already been examined on that point.

By Mr. Stephenson: That is all I want to ask him.

Witness stands aside.

[fol. 129] SAMUEL J. WRIGHT recalled.

By Mr. Stephenson:

Q. Mr. Wright, were you present at the time when Mr. Long, the foreman was talking about a matter of Mr. Dodson doing some shooting at night around the house there where they lived?

Same objection. Overruled. Exception.

A. Yes, sir.

Q. Tell the Court and jury what that conversation was and when it was.

Same objection. Overruled. Exception.

A. He came out there and told us that it was really dangerous that the man was nervous and it wouldn't do for anyone to fool around where he was at.

Q. Did he tell you what he had done?
A. Yes, sir.
Q. What did he say he had done?
A. He said he had shot through the window that night.
Q. When was that that he was telling you about this?
A. He told us just before he done this shooting.
Q. You mean he told that before the shooting of Bryant?
A. Yes, sir.
Q. And that was with reference to the shooting that Dodson had done through the window or door, or whatever it was, or when was it with reference to that, was it shortly afterwards?
A. No, sir, that was before, he shot through this window before he done this shooting of this man you understand?
Q. Yes, I understand that, and when was it that he was telling it, was it shortly afterwards?
A. Yes, sir, it was shortly after he had done this other shooting you know.
Q. Did he tell you more than once about that, or did he discuss that more than once that you heard?
A. Yes, sir.
Q. When did he talk about it again?
[fol. 130] A. Several different times it would come up in a way, in talking.
Q. And this first time was immediately after it happened, you say?
A. Yes, sir.
Q. I mean immediately after the shooting through the window?
A. Yes, sir.
Q. Did he say what he shot with?
A. No, sir, he didn't say.
Q. Did he say what he was shooting at?
A. No, sir, he didn't say what he was shooting at.

Cross-examination.

By Mr. Perry:

Q. Just when was this, I mean the time when it occurred?
A. I don't know what time it occurred, but it occurred before he done this shooting.

Q. That is, before he shot Bryant?

A. Yes, sir, and then Mr. Long, he came out and told us after he done this shooting, and he said "he is a nervous man."

Q. He had done the shooting the night before and Long told this out on the section, and——

A. No, sir.

Q. Wait until I finish my question, and Long out on the section told you all about it?

A. Yes, sir, he told us on the section about it.

Q. How did he come to tell you that?

A. It just came up in a way of talking you know, in a conversation, we were all talking.

Q. Was Dodson there at the time?

A. No, sir.

Q. Now just what did Long say that Dodson had done?

A. He said that he was nervous and he had been shooting up there.

Q. Up where?

A. At his house.

Q. That is, at Dodson's house?

A. Yes, sir.

Q. Did Dodson and Long live together?

A. He was staying up there with Dodson just batching with him.

[fol. 131] Q. And he said that this shooting had been done the night before by Dodson up at the house. Now what did he say brought the shooting about?

A. He never said.

Q. What did he say he shot at?

A. He never said what he shot at, he just heard a racket.

Q. That Dodson heard a racket out doors?

A. Yes, sir.

Q. And he shot through the door?

A. No, sir, he shot through the window.

Q. At whatever he heard outside?

A. Yes, sir.

Q. Didn't he say something about the dogs making a racket?

A. No, sir, I never understood what he said about the dogs.

Q. What did he say about him being real dangerous?

A. About Dodson being real dangerous?

Q. Yes, sir.

A. He said he was nervous and real dangerous.

Q. That Dodson was nervous and real dangerous?

A. Yes, sir.

Q. Did you ever hear of Dodson ever hitting a man?

A. No, sir.

Q. Did you ever hear of Dodson having a fight?

A. No, sir.

Q. And how long did you work with Dodson on the section?

A. I worked with Dodson off and on about six months when Long was gone.

Q. When Long was there how long did you work with him?

A. I didn't work so awful long when he was there for he always kept him off somewhere else.

Q. Dodson was a very quiet and retiring sort of man, wasn't he?

A. No, sir, he was nervous.

Q. But he was a quiet man and he didn't talk much to other people, did he?

A. He talked a good deal.

Q. Was he a modest man or was he a cursing and bully?

A. He was pretty stubborn.

Q. You said on yesterday that he did not cuss, that he was not a profane man or a cusser, you said that on yesterday?

A. Yes, sir, he swore some.

Q. Did he swear at the men or just swear about his work?

A. He would curse the other men.

[fol. 132] Q. On yesterday you stated that he was not a profane man. Now how do you explain the difference when you say now he did cuss?

A. You say that I did state that on yesterday?

Q. That is my recollection.

A. I don't think I did.

Q. Some other witness may have said that. You never heard him having any difficulty with any of the men?

A. No, sir.

Q. Either off or on the work?

A. No, sir.

Witness stands aside.

E. C. THOMPSON recalled.

By Mr. Stephenson:

Q. Did you ever hear any conversation by Mr. E. C. Long, the section foreman, touching the question of Mr. Con Dodson shooting with a gun around the house or anything of that kind, previous to the time Bryant was killed?

By Mr. Perry: I make the same objection to this and all following questions on the same line.

Objection overruled. Defendant excepts.

A. I heard him say out on the track that Dodson shot through the window one night, that he heard a racket and he raised the window and shot through the window.

Q. Did he say anything further about that?

A. He said it was dangerous for a man to come around there.

Q. About how long after that occurrence, that shooting through the window was it until Long was telling about that; shortly afterwards, or how long?

A. It was the next day or two I think.

Q. Did he mention it at any other time that you recall?

A. No, sir, I don't remember him saying anything more about it.

Q. Now at that time, when that occurred, where was Dodson and Mr. Long Living?

A. They were living over there in the hollow at Dodson's place.

[fol. 133] Q. They were living over there in the hollow at Dodson's place at Backbone?

A. Yes, sir, Mr. Long was staying with him.

Q. At Mr. Dodson's house?

A. Yes, sir.

Q. They were both living there and batching in the house, weren't they?

A. Yes, sir.

Q. Their families were not there?

A. No, sir.

Q. They were both married men, weren't they?

A. Yes, sir.

Q. Did their families live at Backbone?

A. No, sir, Mr. Long's family lived at Moss Run.

Q. And so did Dodson?

A. Mr. Dodson's wife was down at her father's

Q. They were not living with their families, or were they?

Objected to as immaterial and irrelevant.

By the Court: I do not think it is material.

By Mr. Perry:

Q. This was some little time before the shooting of Bryant that you heard this?

A. Yes, sir, this was before the shooting of Bryant.

Q. Do you recall how long before Dodson shot Bryant it was?

A. No, sir, I just don't remember, it might have been a month or it might have been longer or not so long.

Q. It was the same summer?

A. Yes, sir.

Q. And Long, down on the track, either the next day or the day after, told you men that Dodson the night before had shot through the window or had raised the window and shot?

A. Yes, sir.

Q. Did he say why he had shot?

A. No, sir, but he said he heard a racket and he just shot through the window.

Q. Into the outside?

A. Yes, sir.

[fol. 134] Q. And then I understood you to say that Mr. Long said it was dangerous for a man to be around outside the house. Is that correct?

A. He said it was dangerous for a man coming around there.

Q. To come around the house?

A. Yes, sir.

Q. How long did you work with Dodson?

A. I don't suppose I worked over six or eight months with Dodson until he taken a gang to himself.

Q. Did Dodson ever have a fight or difficulty with any man while you were there?

A. No, sir, he never did.

Q. Did you ever hear of him striking anybody or seeing him strike anybody?

A. No, sir.

Q. What was his disposition, was he a peaceful man, or not?

A. No, sir, he wasn't.

Q. What was his disposition?

A. He had a disposition that it didn't seem like he could get along with anybody.

Q. But he was not a fighter?

A. No, sir, he never had any fight or anything like that.

Witness stands aside.

W. M. McDowell (col'd) recalled.

By Mr. Stephenson:

Q. You are acquainted with Mr. C. E. Long, the foreman, of course?

A. Yes, sir.

Q. Did you ever hear any conversation by Mr. Long touching the question of Mr. Con Dodson having been a man that would shoot and of his shooting around up there at the house where they lived previous to the time that Bryant was shot?

By Mr. Perry: I make the same objection as heretofore, and except to this and other questions and answers on the same line.

A. I heard Mr. Long speak out there one day out on the railroad a while back before the shooting occurred at the [fol. 135] toolhouse, that they heard a racket up at the house one night and Mr. Dodson got up and shot through the screen window and he stated then that it would be dangerous for anybody to fool around where Mr. Dodson was, that he was nervous and they would be liable to be shot.

Q. That it was dangerous for anyone to fool around where he was, that he was nervous and would shoot him?

A. Yes, sir.

Q. You are positive about that statement?

A. Yes, sir.

Q. Was that shortly after the shooting through the window had occurred?

A. I don't know exactly how long it was, it was three or four weeks I reckon.

Q. Before the shooting of Bryant, you mean?

A. Yes, sir.

Q. And was that shortly after the incident that he was telling about, was it shortly after the shooting through the window that he was telling you men about it?

A. He told it a few days after the shooting at the house.

Q. Was that about the purport of his conversation in regard to that?

A. Yes, sir.

Q. Was that about the extent of his conversation?

A. Yes, sir.

Q. Did he comment or say anything about it at any other time that you know of, or after Marshall Bryant was shot?

A. Not to my knowing, I never heard of it.

Cross-examination.

By Mr. Perry:

Q. That was out on the track, wasn't it, William; do they call you William or Jim?

A. William.

Q. That was out on the track?

A. Yes, sir.

Q. Do you know whether Dodson was there when Mr. Long was talking?

A. No, sir, he wasn't present at the time.

Q. State again just what it was that Mr. Long said had happened.

[fol. 136] A. He said that they heard a racket around the house at night.

Q. The night before or two or three nights before?

A. The night he done the shooting at the house I am speaking of, so Mr. Dodson, he got up and got his gun and shot through the window, he thought he heard someone walking or something or other and he shot through the window screen.

Q. And he said that it was dangerous for anybody to be around there?

A. Dangerous for anyone to fool around where he was, because he was nervous and liable to shoot him.

Q. Did he say that it was dangerous for anyone to fool up around the house?

A. Yes, sir, that is what he said.

Q. He meant at night, I suppose?

A. I guess so.

Q. You have seen Mr. Dodson working around there for a good many months, hadn't you?

A. Yes, sir, about two years. I figured it up last night, and I worked around there for about two years.

Q. Did you ever hear or see him have any fight with anybody?

A. No, sir.

Q. Did you ever hear of him having any fight?

A. No, sir.

Q. He did not engage in any personal difficulties at all, did he?

A. Not to my knowling.

By Mr. Stephenson:

Q. But he was a man that did not get along easy with people, wasn't he?

A. He was kinda of fractious.

Q. Kinda fractious?

A. Yes, sir.

Witness stands aside.

Plaintiff rests in chief.

EVIDENCE INTRODUCED ON BEHALF OF DEFENDANT

By Mr. Perry: If your Honor please, I want to introduce the indictment of Con. P. Dodson and the record of his conviction.

[fol. 137] By Mr. Stephenson: We object to it because it is immaterial here.

By Mr. Perry: It is rather material because this was a felony and the result of a private quarrel.

By Mr. Stephenson: Counsel for the defendant has stated in his statement to the jury that he was convicted and sent to the penitentiary.

By Mr. Perry: Cannot I prove what I stated?

By Mr. Stephenson: We object to this evidence and submit that it is entirely incompetent.

By the Court: What is the materiality of it, Mr. Perry?

By Mr. Perry: The materiality is this, there is a strong presumption that a felony or a felonious assault was not and could not have been committeed within the scope of the man's employment, therefore it is material to show that the assault was a felonious assault and the best proof is the man's conviction of a felony.

By the Court: I think it is immaterial.

By Mr. Perry: I desire, for the purposes of the record, to offer the indictment and record of his conviction and except to the ruling of the Court.

L. E. Crance, sworn for defendant.

Direct examination.

By Mr. Perry:

Q. Mr. Crance, where do you live?

A. I room at Clifton Forge, and I live at Ashland, Kentucky.

Q. You are in the employment of the Chesapeake & Chio Railway Company?

A. Yes, sir.

[fol. 138] Q. How long have you worked for the railroad company?

A. About 23 years.

Q. What is your position at the present time?

A. Supervisor of Tracks.

Q. In what district?

A. The Alleghany District.

Q. That is, from Clifton Forge, Virginia, to Hinton, W. Va.?

A. Yes, sir.

Q. You were Supervisor of Tracks at the time of the shooting of Bryant by Mr. Dodson, weren't you?

A. Yes, sir.

Q. Was the section at Backbone within your district?

A. Yes, sir.

Q. State whether or not you knew Dodson, the man who shot Bryant?

A. Yes, sir, I knew him.

Q. How long had you known him?

A. I couldn't say just exactly but about seven or eight years, or something like that.

Q. As Supervisor of Tracks, Mr. Crance, state whether or not your duties called you or put you in touch with the men on the section and with the section foremen?

A. Yes, sir, I had charge of all sections on my district, and the foremen too and I instruct them in all their work and what to do.

Q. State whether or not the Chesapeake & Ohio Railway Co. on which Bryant was at work at the time he was killed or before he was killed, state whether the Chesapeake & Ohio, or where it runs in a general way; does it run into one or more States or not?

A. Yes, sir, it runs from Chicago, Illinois, to Newport News.

Q. Through Illinois, Ohio, Indiana, Kentucky and West Virginia and Virginia?

A. Yes, sir.

Q. And this shooting of Bryant occurred on the main line, I believe?

A. Yes, sir, I understand at the toolhouse.

Q. State whether or not any interstate traffice is carried over that main line near and by the point at which Bryant worked?

A. Yes, sir, there is all kinds of interstate traffic carried over it.

By Mr. Stephenson: We object to that as irrelevant and immaterial.

[fol. 139] By Mr. Perry: I just wanted to show that it was an interstate railroad.

By the Court: You may show that it was an interstate railroad and you can note your objection if you desire.

By Mr. Perry: We would like to note an exception.

By Mr. Perry:

Q. How was Bryant employed before he was discharged; what did he do or what did he work at?

A. As a track laborer.

Q. He was a track laborer?

A. Yes, sir.

Q. Working on the main line?

A. Working on the section, yes, sir.

Q. Were you up in that neighborhood in the course of your employment at any time within a short time prior to the shooting of Bryant, if so, when?

A. I was up there on Saturday before this happened.

Q. You were on the worktrain, I believe?

A. No, sir, we were changing the line of curve, we had a heavy job there and I was there looking after it.

Q. Were you on the worktrain or were you just travelling through there?

A. I was just travelling, I was up there on a motor car, I think, as well as I recollect.

Q. What were those men engaged on at that time, when you were there?

A. We were lining a curve and filling in.

Q. Just where?

A. Right at the east end of Moore's tunnel.

Q. On Mr. Long's section?

A. Yes, sir, right west of Backbone.

Q. About how many men were at work on that job?

A. I expect I had about 50 men there that day, I don't know just exactly, but something near that.

Q. You had then other men besides Mr. Long's force at work?

A. Yes, sir, I had the extra gang, Mr. Wickline's force.

[fol. 140] Q. Was Mr. Wickline there himself?

A. Yes, sir.

Q. And Mr. Long's force was there?

A. Yes, sir.

Q. Was Mr. Long there?

A. No, sir.

Q. Who was in charge of Mr. Long's force?

A. He left Dodson in charge.

Q. He left Dodson in charge, who left him in charge?

A. Mr. Long. I passed along and his mother was dead and he had to go to the funeral and Dodson was the only suitable man he had to do the work and look after the work.

Q. Mr. Long had gone to his mother's funeral?

A. Yes, sir.

Q. And Mr. Long had left Mr. Dodson there. Is that correct?

A. Yes, sir.

Q. How long had you known Dodson in his work there?

A. I have known him ever since he was working there, about seven or eight years, or something like that, I don't know just exactly how long.

Q. State whether or not any person had ever complained to you of any misconduct on Dodson's part?

A. No, sir.

Q. Had you ever heard anything prior to this shooting derogatory or against the character of this man Dodson?

A. No, sir.

Q. It is in evidence here that Mr. Dodson was a very nervous man and an irritable man. State what had been your observation of Dodson?

A. I always thought that Dodson was a quiet sort of a fellow, he was a man that did not have any education but he was a good workman.

By Mr. Stephenson: We object to that statement, he is stating an opinion now and we move to strike it out.

By Mr. Perry: I will withdraw that question.

Q. State whether or not you had ever heard or had ever observed that Dodson was irritable?

[fol. 141] By Mr. Stephenson: We object for the same reason, heretofore stated, and because it is mingling two question together.

By the Court: I think either one would be admissible.

By Mr. Stephenson: If he knew his reputation it would be admissible, but he must show that he knew it first.

By the Court: I think it is admissible.

By Mr. Perry:

Q. What pay do section laborers get, and what are their hours of labor, I mean at the time this shooting occurred?

A. They get $2.96 a day, 37½ cents an hour for an eight-hour day.

Q. Mr. Crance, I wish you would state whether or not you know what the duties of a section foreman are, and if so, state them?

By Mr. Stephenson: We object to the question. We are only dealing with one question, and that is what their duties were. He may state what the duties of a section foreman are if he knows.

By Mr. Perry:

Q. Do you know?

A. Yes, sir.

Q. What are they?

A. The duties of a section foreman is to maintain the track assigned to him in proper line and surface, keep up what fences is on his right of way, look after the Company's property in general, keep everything in a neat and orderly manner and do the work assigned to him.

Q. It is in evidence here that Mr. Dodson told you on Saturday evening before the shooting of Bryant that he was going to discharge Bryant. State what you know of that, if anything?

A. Bryant wasn't working that day, that is, he wasn't doing his duty on the job.

[fol. 142] My Mr. Curry: We object to that.

By Mr. Perry:

Q. You mean Dodson told you that?

A. No, sir, I observed that when I was there.

By the Court: Go ahead.

A. And I called Dodson's attention to it, I said "get that man up there and get busy, we have got a terrible day's work on hand and I want to get it done," and he said "he won't do anything that I tell him," and I said "tell him to leave and draw his money, I don't want him any longer if he don't want to work."

Q. That was on Saturday afternoon?

A. Yes, sir.

Cross-examination.

By Mr. Curry:

Q. You, in fact, discharged him yourself or directed his discharge?

A. Yes, sir, I directed it.

Q. Dodson was in charge of the hands that day?

A. Yes, sir.

Q. And had been during Mr. Long's absence on account of the sickness of his mother?

A. Yes, sir.

Q. You knew about that, of course?

A. Yes, sir.

Q. Of course, Mr. Crance, how do you pronounce your name?

A. C-r-a-n-c-e.

Q. What is the extent of your division?

A. I have got 83 miles of main line.

Q. You just have general supervision of the railroad track?

A. Yes, sir.

Q. And the section foremen of course are charged with the maintenance of the whole right of way?

A. Yes, sir, they have four miles of track.

Q. And you, of course, do not stay on the work with the foremen very much or with the hands, you just go and see that they are doing the work properly?

[fol. 143] A. I am from one end to the other.

Q. As a matter of fact, I presume, you did not make any inquiry at all about Mr. Dodson's general characteristics?

A. No, sir, nothing only I have been working with him and around by him ever since he has been on the railroad.

Q. You have just had general supervision and you are there casually, but you haven't made any inquiry about his characteristics?

A. No, sir, I hadn't asked anything about him.

Witness stands aside.

C. E. Long sworn for defendant.

Direct examination.

By Mr. Perry:

Q. You live in Alleghany County, I believe?

A. Yes, sir.

Q. You were born and raised here?

A. No, sir, I was born and raised in Greenbrier County.

Q. How long have you lived in Alleghany County?

A. Ever since the 15th day of June, 1914.

Q. What has been your occupation during that time?

A. Section foreman.

Q. For the Chesapeake & Ohio Railway Company?

A. Yes, sir.

Q. What was your section?

A. Backbone, Va., Section 106.

Q. You are the Mr. Long that they have mentioned in this evidence as being section foreman in charge of the section where Dodson shot Bryant?

A. Yes, sir.

Q. How long had you known Dodson?

A. I have known him ever since July 1st, 1919.

Q. How did you happen to come to know him then?

A. He came out there and got a job from me on the section.

Q. Doing what?

A. Doing track work, a laborer under me.

Q. How long did you know Bryant?

A. I have known Bryant for about two years.

Q. How did you come to know him?

A. He came the same as Dodson to get a job as a laborer on the tracks.

Q. He was a laborer on the section?

[fol. 144] A. Yes, sir.

Q. Up to the time of Bryant's discharge was Bryant working as a section laborer on the section there?

A. Yes, sir.

Q. How many days on an average during the year would section men like Bryant labor?

A. He would labor something like about 20 days along like that, or 22 or 23 days, he didn't work exactly every day.

Q. I suppose in very rainy and inclement weather when the work could not be done, the track force did not work?

A. No, sir.

Q. How much did Bryant get per day?

A. He got 37 cents an hour or $2.96 a day for eight hours work.

Q. I do not believe you were in charge of your work or present on your work at the time this thing occurred?

A. No, sir.

Q. How did that happen?

A. I lost my mother at that time, she was ill for sometime, and I was called away to her death and burial.

Q. This shooting occurred on Monday. What day were you called way?

A. I was called away on Thursday before that.

Q. Were you called away while you were at work?

A. Yes, sir, while I was at work.

Q. What work were you on at that time?

A. I was changing some tracks up there, changing the line, you know and we were silling and surfacing.

Q. When you say silling, you mean putting new ties?

A. Yes, sir.

Q. And changing the tracks?

A. Yes, sir, and lining it over to a uniform line.

Q. Was that a heavy or light job?

A. That was a pretty heavy job, yes, sir.

Q. How many men were you working the day you left on that job?

A. I don't know just exactly the number of men on that day, but I had 31 men on the payroll, counting myself and all.

Q. That included not only the men that were working on that silling job but the men that were working at the ditching and things like that?

A. Yes, sir.

[fol. 145] Q. It is in evidence here that Dodson, during the summer before the shooting, had been working for himself, that is, he was in charge of a gang. Was he ever at any time working any way but under you?

A. He was just working under my direction. I sent him out to put in ties and smooth up the general track work.

Q. He would have men under him when you would send him out?

A. Yes, sir, I allowed him to have five or six men to do this work.

Q. Judging by the results of his work and the manner in which his work was done and the manner in which he got along with the men working under him, state what Dodson's character was as a man who had charge of men?

A. He had a good character, he handled the men well, and got along with his work well, I had no objection to it whatever, he was a competent man to send out and he done his work in a safe manner.

Q. State whether or not at any time before this shooting any persons every complained to you about Mr. Dodson?

A. No, sir, nobody ever complained to me.

Q. You worked yourself with your men, didn't you?
A. Yes, sir.
Q. Did you work alongside Dodson?
A. I had Dodson on my force for a number of years, and I had no trouble with him, and there was no difficulty between him and the other men and not between me and him. His work was satisfactory, therefore I kept him in the employment of the company.
Q. State what happened on Thursday when you were called away? What did you do?
A. I got a message to come home, that my mother was dying and the Supervisor of Tracks, that is, my first superior officer, he appeared there in about an hour later.
Q. That is, Mr. Crance?
A. Yes, sir, and I told him I had this message, and that I had to be away, and I did not know just exactly how many days I would be away and I told him to get Dodson down there from up where he was doing his work with a bunch of men and turn the work over to him, so he could keep going.
Q. That is, this work that you were then doing?
A. This work I was doing, so I did that and Mr. Crance said it would be all right to do that, and he said——
Q. Never mind what Mr. Crance said to you. Did you call Dodson down?
A. Yes, sir.
Q. State to the jury what you told Dodson to do?
[fol. 146] A. I told Dodson to go ahead and change the curves in the line, they had to go over four feet off this natural bed, it had to be throwed over, and I told him to go ahead——

By Mr. Stephenson: We object to that on the ground that he stated Mr. Crance authorized the employment of Mr. Dodson in his place and stated that as an admitted fact.
By the Court: I do not think it is necessary to go into all the details of how far he was to move the track, but the objection may be overruled.

By Mr. Perry:
Q. Read the last question. (Question read.)
A. And I told him to go ahead and change this curve to

the uniform line around the curve to the grade stakes.

Q. How long would that work take with the force that you had there?

A. It would take some four or five days to complete it.

Q. What, if anything else, did you tell Dodson to do while you were gone?

A. I told him to look after the general condition of the track, the surface and line over the section, of four miles.

Q. When did you go back to work?

A. I went back to work on Tuesday, the 1st day of September.

Q. Tuesday following the Thursday that you left?

A. Yes, sir.

Q. During all this time this man Dodson worked there for you and with you did you observe him having any fight or did you ever hear of him having any fight?

A. No, sir.

Q. The evidence here is that on one occasion, shortly before this shooting, you told the track hands of an occurrence at Dodson's house the night before, that Dodson shot through the window. Please state to the Court and jury anything you know in regard to that matter?

A. Dodson stated that he heard the dogs barking and he had two dogs there and he said he heard something around that was interfering around about the house, and where his bed sat in his room there was just a screen window between it and he just shot out of the window two or three times to scare anything that was there away.

[fol. 147] A. Did you see him shoot?

A. No, sir, I was in one room and he was in another, but I heard him shooting.

Q. State whether or not you told either Dolph Wright or Taylor Thompson or Sam Wright that Dodson was a dangerous man?

A. No, sir.

Q. State what, if anything, you said in regard to danger?

A. All I said in the way of danger was I said if any of them happened to go around his place, it would be well enough to call out or make some alarm.

Q. You stated that it was dangerous to go around there at night?

A. And make no alarm, that it might be possible that he would take you to be something or other or somebody trying to get in or varmints or something or other, and he might shoot out that way to scare whatever it was and he might hit somebody.

Q. You meant that it was not a safe place or it was not a good place to go around at night without warning?

A. No, sir.

Q. How long did you stay in the same house with Dodson?

A. Some three or four months.

Q. During that time how often did this shooting occur?

A. Just once that I know of.

Q. It never occurred at any other time?

A. No, sir.

Q. Did you give Dodson any authority to police or guard the railroad tracks against trespassers?

A. No, sir, he had none.

By Mr. Stephenson: We object to the question and move to strike the answer out.

Motion overruled. Plaintiff excepts.

Cross-examination.

By Mr. Stephenson:

Q. Mr. Long, it is a fact that he had policed or carried a gun with your permission and knowledge, isn't it, in his duties. Isn't that right?

A. While he was watching he did, that is, before and when he was not in charge of any body of men.

[fol. 148] Q. He was carrying a gun and policing Moore's Tunnel or guarding it?

A. He was watching Moore's Tunnel, he wasn't guarding it from trespassers, he was watching it in case any rocks fell.

Q. And he was carrying a gun at that time?

A. He carried a gun at that time.

Q. He was working for you, wasn't he?

A. Yes, sir.

Q. And that was just a short time before this transaction?

A. That was a good while before.

Q. The same summer wasn't it?

A. It was during the winter.

Q. During the preceding winter?

A. Yes, sir.

Q. You and him during that summer of 1925, lived there at his house together at Backbone, didn't you?

A. Yes, sir.

Q. Just you and he?

A. Yes, sir.

Q. In his house?

A. Yes, sir.

Q. Batching you might say?

A. Yes, sir.

Q. And during that summer you were the section foreman and you had a crowd of men working on the section and he had another crowd of men working on the section, isn't that right?

A. He had a bunch of men, I sent a bunch of men out with him, out to do the work.

Q. He took his crew and went up and worked them all day and came in at night just as you did?

A. Yes, sir.

Q. And he had complete control of the men, didn't he?

A. Yes, sir.

Q. No question about that; and it is a fact that he discharged some of these men, isn't it?

A. Yes, sir.

Q. He had that authority to discharge them?

A. Yes, sir.

Q. Just as you had; the men he discharged were Snead and Matheny, at least they were two of them?

A. I don't know whether he discharged Matheny, or not, but he discharged Snead.

[fol. 149] Q. And he had authority to hire and employ and discharge the men just as you had?

A. Yes, sir.

Q. That was just a short time before he was put in charge of the whole crew, wasn't it?

A. Yes, sir.

Q. That is a fact, that the discharging of these men took place. Is that right?

A. Yes, sir.

Q. Isn't it a fact, or not, that during the summer or during the preceding month before your mother's last illness and death, that you were off at home a number of times?

A. Yes, sir, I was off at home.

Q. And when you were away on these occasions Mr. Dodson was in charge of the section hands, wasn't he?

A. Yes, sir, he took charge of the entire force.

Q. That is correct?

A. Yes, sir.

Q. He was a sub-foreman and had been for sometime, hadn't he?

A. He worked some three or four months, or something like that.

Q. As a sub-foreman?

A. Yes, sir.

Q. And when you were away on a number of visits, about how many times, do you recall, you were called home or went home to visit your mother, or that you were away that summer?

A. There is no record kept of the time, but sometimes once a week and sometimes maybe twice a week.

Q. At any rate, it was very often?

A. About an average run would be once or twice a week.

Q. And you would be gone a day or two at a time?

A. No, sir, I would be gone a day and maybe a part of another day or something like that.

Q. You went over in West Virginia to visit your mother?

A. Yes, sir.

Q. And that occurred during a month or six weeks previous to the killing of Bryant?

A. Yes, sir.

Q. And during that time Dodson was in charge?

A. Yes, sir.

Q. Now on this particular occasion when you went away, on Thursday before Marshall Bryant was killed, you expected to be gone sometime, didn't you?

[fol. 150] A. Yes, sir, I was figuring to be gone——

Q. Indefinitely?

A. I don't know about that, I did not know when I would be able to get back.

Q. You thought that she was seriously ill and might last some time?

A. Yes, sir, might last for a week or more.

Q. And you expected to stay at your mother's bedside?

A. Yes, sir.

Q. On that occasion, as you have told the jury I think, Mr. Crance was there on that Thursday and you talked to him at Moore's Tunnel?

A. Yes, sir, I talked to him right on the works.

Q. And you told him you had to go?

A. Yes, sir.

Q. And you asked him about putting Mr. Dodson in charge. Is that right?

A. Yes, sir.

Q. And he said that was all right?

A. Yes, sir.

Q. And then you left and Dodson was put in charge of the whole crew. Is that right?

A. Yes, sir.

Q. That is absolutely right?

A. Yes, sir.

Q. And it was the general custom, as you have stated, of yourself and others to employ and discharge men?

By Mr. Perry: I object to the question because he has not said it was the general custom of himself and others. He said what he did himself.

By Mr. Stephenson:

Q. On your section that was the general custom for you to employ and discharge men, wasn't it?

A. Yes, sir, if a man didn't give satisfaction we did not want him.

Q. And that was the general custom on the railroad everywhere, wasn't it?

By Mr. Perry: I object to that.

[fol. 151] By the Court: It doesn't make any difference what the general custom on the road everywhere was, the question is what was Dodson's power and authority there, at this time, and you will confine it to that. This witness has testified that Dodson had the power to hire and discharge men.

By Mr. Stephenson:

Q. You had that power and that was your instructions?

A. Yes, sir.

Q. From your superior, Mr. Crance?

A. Yes, sir.

Q. Mr. Crance has charge of the entire Maintenance of Way from Clifton Forge to where?

A. To Hinton.

Q. And you were under him?

A. Yes, sir.

Q. He had charge of all track operations, didn't he?

A. Yes, sir.

Q. Now Mr. Long with regard to the question of the shooting up there that night, didn't he shoot out there more than once at night?

A. More than one night, you mean?

Q. Yes, sir.

A. Not that I know of, not but one night.

Q. You only know of the one night?

A. Yes, sir.

Q. And didn't you say to the men on the next day that Dodson was awfully nervous and it was dangerous and unsafe to go about him up there at night?

A. Dangerous and unsafe?

Q. Yes, sir.

A. No, sir, I didn't say that, unless they let themselves be made known.

Q. You meant that he was shooting at any kind of a noise or what he might think was a shadow or anything like that?

A. What he told me himself, he said that there was something around about the house and he didn't say whether it was a man or an animal or a varmint or what it was, and he would shoot out, he said, to scare it away.

Q. You were right in the room with him?

[fol. 152] A. No, sir. I was in another room from him, but I was in the same house.

Q. That was just an imagination of his wasn't it?

A. I suppose it was. I thought it was an imagination of his.

Q. He just heard something and he got up and banged loose through the screen?

A. I don't know that he had seen anything.

Q. He didn't claim to have seen anything, did he?

A. No, sir, he didn't claim to have seen anything whatever, but it might be that he thought he would scare it away.

Q. He shot several times?

A. Two or three times.

Q. He kept a gun near him all the time, didn't he?

A. He had a gun all the time at the house.

Q. And you were really warning the men not to go about there because you thought it would be unsafe and he might crack down on them. Is that right?

A. Warning them not to go there unless they let themselves be known.

Q. Because he was nervous and excitable, that is a fact, isn't it?

A. You take anybody, if he heard a racket around there, or something or other that they couldn't tell what it was, they are going to investigate somehow or another.

Q. Wasn't it because he was nervous and excitable and banging loose there at nothing, that you told them they had better stay away?

A. I cannot say he was nervous and excitable.

Q. Didn't you tell them he was nervous and excitable and a dangerous man and to stay away from there?

A. Not unless they let themselves be known.

Q. Unless the men came up and told him who they were, of course, it would be safe then?

A. Yes, sir.

Q. And if they didn't do that it would be unsafe?

A. I meant to let themselves be known if they came to the house, but that if anything happened to be prowling around the place, it might be unsafe.

Q. And might you not have said and didn't you say to these men when talking about this matter that he was highly nervous and a dangerous man, didn't you say that?

A. No, sir, I didn't say he was a dangerous man.

Q. You might have said that, might you not?

[fol. 153] A. No, sir, I cannot say that I might have said it.

Q. Didn't you say he was an awfully nervous man and liable to shoot somebody?

A. I didn't say he was nervous. I said if anyone was prowling around there, he might accidentally shoot.

Q. Might accidentally shoot?

A. Yes, sir, he might.

Q. You don't mean to tell the jury that the night he let loose and shot two or three times that was accidental?

A. No, sir, that wasn't accidental.

Q. He was just shooting at something that was supposed to be there and that wasn't there?

A. I don't know whether he shot at it or not, it might have been a way off.

Q. There wasn't anything there that you heard or saw?

A. No, sir, nothing that I saw.

Q. Is that house in sight of any other houses there?

A. No, sir.

Q. It is pretty close to the tracks, isn't it?

A. Yes, sir, tolerably close.

Q. How close?

A. Something like about 300 yards.

Q. About 300 yards from the main line track?

A. Yes, sir.

Q. You and Mr. Dodson were on very intimate terms, weren't you?

A. We were good friends, we had no trouble, no reason to be any other way.

Q. You had worked together a long time?

A. Yes, sir, ever since July 1, 1919.

Q. And the relationship between you was such that anything that you did he thought was all right, and anything he did you thought was all right? Wasn't that about right, now?

Objection. Overruled. Exception.

Q. Isn't that right?

A. He could do wrong, sure, he could do wrong.

Q. I am talking about before this killing occurred, you thought anything that Dodson did was all right, didn't you?

A. Provided it was all right.

[fol. 154] Q. And you thought anything that he would do was all right?

A. I thought he would do what was all right. I never seen him do anything else previous that wasn't all right.

Q. He thought you were all right?

A. Yes, sir, I treated him right.

Q. You were just as intimate as two men could be, ain't that right?

A. Sure, we were friends as far as that is concerned, and we worked together.

Q. And I say as friends and comrades you were just as intimate as two men could be, weren't you?

A. Yes, sir, so far as right went.

Q. I am not saying that there is anything wrong about that, I don't mean to infer that at all, but you were living in his house, you and him together?

A. Yes, sir.

Q. On most intimate terms. Hadn't you had a little flare up with Dodson on a few occasions, didn't he flare up at you a few times?

A. No, sir, not particularly.

Q. I mean any time, hasn't he, now?

A. No, sir, he hadn't himself at all.

Q. I am talking about him now?

A. No, sir.

Q. Didn't he get sore at you on one or two occasions?

A. No, sir, not that I know of.

Q. You think not?

A. No, sir, he never got sore at me.

Q. He was a man that did not get along amicably and nicely with other men though, did he?

A. He did while he was under me.

Q. Wasn't he of a type of man that was irritable and quick tempered and had trouble with other men that he worked with?

A. No, sir, not while he was working with me.

Q. Wasn't he a man of a disturbing nature and had something wrong with him that made him irritable?

A. He always claimed he had a weak stomach.

Q. And that affected his disposition, didn't it?

A. I suppose maybe it would to a certain extent, but it did not affect him in his ability to work.

Q. But it made him at times grouchy and peculiar, didn't it now, or something like that?

A. It did not interfere with me or the men a particle in the world, that I know of.

[fol. 155] Q. I understand about his work, but I said there was something else that made him grouchy and peculiar?

A. If it did, it did not bother anybody.

Q. I am not saying that, or not, but that did happen, didn't it?

A. I cannot say that it really did happen because you may be out here and not have much to say to the men, but you cannot tell whether he is mad with anybody or whether his feelings is the cause or what.

Q. And he was that kind of a man, sometimes he was grouchy and sometimes he wasn't isn't that right?

A. Sometimes he didn't have as much to say as at other times, but you and me would be the same way.

Q. He was peculiar that way?

A. No, sir, he was not peculiar all the time that way.

Q. I don't mean he was all the time, but at times, and very often he was kinda grouchy?

A. No, sir, not often.

Q. But he was grouchy?

A. Not often.

Q. Not often?

A. No, sir.

Q. You just now said in answer to my question that he wasn't all the time, what did you mean by that by saying he wasn't grouchy and peculiar all the time, what did you mean by that?

A. According to what you are trying to drive at, you would think he was regularly a bull-head all the time, but he wasn't a man of that type.

Q. He wasn't a man of that type all the time?

A. No, sir.

By Mr. Perry: He didn't say all the time, he said he wasn't a man of that type.

By Mr. Stephenson:

Q. He was that way sometimes?

A. He wouldn't have much to say sometimes, but it did not interfere with his work and duties at all.

Q. At those times, if you did not let him alone, he was irritable and stubborn, wasn't he?

A. No, sir, he didn't bother me a bit, it might have been bothering him, but it wasn't bothering anybody else that I ever saw.

[fol. 156] Q. The truth of the business is you would say that he was a satisfactory worker?

A. Yes, sir, he was a satisfactory worker.

Q. You knew of his peculiarities, as everybody else knew them, didn't you?

A. I understood him.

Q. Because you had been long with him there for years, yes, you understood him, you knew him that way, didn't you?

A. Yes, sir, I knew him.

Q. You knew it wouldn't do to fool with him when he was stubborn and irritable?

A. There was no feeling between me and him.

Q. You knew when he was not feeling good and nervous as he frequently was, wasn't he frequently nervous and irritable?

A. Not frequently.

Q. But sometimes he was?

A. Sometimes he wouldn't have much to say.

Q. And at those times you knew it wouldn't do to fool with him?

A. It didn't bother me at least, he done what I told him in that case as much so as he did in any other case, he done what I told him to do in those cases as well as he did any other time.

Q. But as you have stated just now you on those occasions laid off him and did not bother him?

A. No, sir, I did not make any statement of that kind.

By Mr. Perry: That is what you stated, Mr. Stephenson.

By Mr. Stephenson: Wait a minute, Mr. Perry. Let me ask the witness a question.

Q. When you were working there, before he took charge on Thursday, Mr. Bryant was on your section all the time?

A. He was working in my gang.

Q. He wasn't working under Dodson all of this time, was he?

A. He had worked with Dodson.
Q. He had worked with him some?
A. Yes, sir.
Q. But he was usually in your gang?
A. Usually in my gang, yes, sir.

[fol. 157] By Mr. Perry:

Q. Mr. Long where is Moore's Tunnel?
A. Mile Post 301.
Q. That is west of Backbone?
A. Yes, sir, about three-quarters of a mile west of Backbone.
Q. How long is Moore's Tunnel?
A. About 500 feet through it.
Q. And that country where Moore's Tunnel is, is it a mountainous country or a good level open country?
A. It is mountainous.
Q. Is it thickly settled or very sparsely settled?
A. Around there in half a mile of the place there is nobody lives at all.
Q. When Dodson was the watchman for rocks, there, was he the day or night watchman, or when was he on duty?
A. He was on duty as the night watchman.
Q. I understood you to say that you permitted him to carry a pistol out there on that mountain?
A. He carried it himself. I did not permit him to do it.
Q. What was the purpose of the pistol?
A. I suppose to protect his own self.
Q. Did it have anything to do with watching for trespassers or anything like that?
A. No, sir, nothing whatever.
Q. Was that a dangerous tunnel for falling rock?
A. Yes, sir, it was at that time.
Q. Mr. Stephenson, in his cross-examination of you has apparently insisted that Dodson was a man who at times was a good man to lay off of, what about that?
A. I don't see where there was any harm in the man whatever at any time.
Q. Did he give the appearance of a dangerous man at any time?
A. No, sir, he did not.

Q. Was there any indication to you that he was a dangerous man at any time?

A. No, sir, not in any way.

Q. He has tried to have you say that he was a man that had a constant grouch?

A. Yes, sir, but that won't work, at times he would have little to say, as I said before, but it did not interfere with [fol. 158] the work and it did not interfere with me, he was obedient to do what I told him to do in those cases, as I stated to Mr. Stephenson.

Q. Did he interfere in any way with other people that were working there?

A. No, sir, he didn't interfere with them at all.

Q. Mr. Stephenson has spoken of him as being a sub-foreman. Is there any employment known as a sub-foreman on your section?

A. Not at the present time.

Q. Who appointed Dodson to the position of sub-foreman, or what does it mean?

A. He did what I told him to do.

Q. He was doing the work that you put him to do?

A. Yes, sir, I gave him charge of this body of men and sent him up there.

Q. He was subbing for you?

A. Yes, sir.

Q. And not by appointment from the Supervisor?

A. Not up until this last time when I was called away.

By Mr. Stephenson:

Q. He worked there several months as a sub-foreman or assistant foreman, didn't he?

A. He done it under me, under my direction.

Q. He was there for some time doing that?

A. He was doing that between three and four months.

Q. And Mr. Crance would come along and oversee the work while he was doing it?

A. Yes, sir.

Q. He knew all about that?

A. Yes, sir.

By Mr. Perry:

Q. When he was subbing that way, what pay did he get, the pay of a foreman, or what?

A. No, sir he got the same pay as a laborer.
Q. He got the same pay as a laborer?
A. Yes, sir, 37 cents an hour.
Q. And the track hands' pay is 37 cents an hour?
A. Yes, sir.
—. You spoke of this sub-foreman hiring and discharging hands. Do you mean when Mr. Dodson was there, that you were there hiring hands?
[fol. 159] A. No, sir, he didn't hire any hands while I was there, I hired them myself?
Q. But he could fire the men in his gang?
A. Yes, sir, if he didn't give satisfactory service.

By Mr. Stephenson:

Q. Mr. Long, Marshall Bryant was a good worker while he was in your gang?
A. Yes, sir, while he worked for me, he worked very well. I had no kick on his work.
Q. He was not quarrelsome or a fussy man, was he?
A. No, sir.

Witness stands aside.
Defendant rests.

By Mr. Perry: If your Honor please, this is a question of law, pure and simple, and we will demur to the evidence.
By Mr. Curry: We join in the demurrer.

IN THE CIRCUIT COURT OF ALLEGHANY COUNTY

[Title omitted]

DEMURRER TO EVIDENCE

And the plaintiff, by his attorney, to maintain the issue on his part, produced to the jury, the following evidence, namely:

(See plaintiff's evidence hereinafter set out in full, page 10 to page 189, both inclusive.)

[fol. 160] And the defendant, by its attorney, to maintain the issue on its part, produces to the jury the following evidence, namely:

(See evidence of defendant hereinafter set out in full, pages 190 to 227.)

Which evidence for the plaintiff and defendant respectively is in a separate paper, marked "O. J. P., Clerk" for identification but it is to be considered as if here set forth at large; and this being all of the evidence, as well for the plaintiff as well as for the defendant, the defendant says that the aforesaid matters to the jurors aforesaid in form as aforesaid shown in evidence are not sufficient in law to maintain the issues joined on the part of the said plaintiff, and that the said defendant is not obliged by the law of the land to answer the same. And this it is ready to verify.

And specifying the grounds of its said demurrer the defendant states:

1. It is not shown that the defendant was guilty of any negligent conduct proximately causing the injury to the plaintiff's intestate as charged in the declaration.

2. The injury to the plaintiff's intestate was not the proximate result of any neglect of duty owing by the defendant to the plaintiff's intestate.

3. That the shooting of the plaintiff's intestate by Dodson (who was the person referred to in the plaintiff's declaration as the defendant's foreman) was not within the scope of said Dodson's employment by the defendant and was not in the prosecution of the defendant's work and was a matter for which the defendant was in no wise responsible.

4. That the plaintiff's intestate was discharged from the defendant's employment on Saturday prior to the Monday of the shooting complained of, and not on said Monday, and said Dodson shot the plaintiff's intestate in the course and as the result of a private quarrel or misunderstanding, and not as a part of and in the course of said Dodson's employment.

5. That at the time of the intestate's injury the defendant was a common carrier engaged in Interstate Commerce and the employment of the intestate by the defendant and of the defendant's foreman, alleged in the declaration were in Interstate Commerce; and the injury to the intestate did not result in whole or in part from the negligence of any officer, agent, or employee of the defendant, or by reason of any defect or insufficiency due to its negligence in its [fol. 161] cars, track, road-bed, work, or other equipment: whereby any cause of action has enured to the plaintiff against the defendant under the law governing such employment and engagement in Interstate Commerce.

6. It does not appear from the evidence that the said Dodson was of a dangerous, vicious, or homicidal character, or that he would become dangerously angry and it does not appear that the defendant had notice or knowledge, or that it could, by the exercise of reasonable care have known that said Dodson was dangerous, vicious, or homicidal, or that he would become dangerously angry.

7. That the shooting of said intestate by said Dodson was entirely separated in point of time and occasion from said intestate's discharge from the defendant's employment, and was not done in the course of discharging intestate or in the course of said Dodson's employment or within the scope of his duties.

Wherefore, for want of sufficient evidence in that behalf shown to the jury in evidence as aforesaid, the defendant prays judgment and that the jurors aforesaid be discharged from giving any judgment upon the issues aforesaid, and that the plaintiff be barred, etc.

—— —— Attorney for Defendant.

In Circuit Court of Alleghany County

Instructions to Jury

By the Court: Gentlemen of the jury, you are relieved at this point of considering this case upon its merits and

your only office now is to ascertain what amount of damages the Chesapeake & Ohio Railway Company should pay to Bryant's Administrator for the death of Bryant, provided the Court on the law of the case is of the opinion that the Railway Company is liable. That has been shifted from you all to me, so that the Court instructs you as follows:

That they have no matter whatever to consider in this case except to ascertain the amount of damages that the plaintiff, subject to the opinion of the Court upon the defendant's demurrer to the evidence, is entitled to recover in this case; and the Court tells the jury that in ascertaining the damages plaintiff is entitled to recover, they should find the same with reference:

1. To the pecuniary loss sustained by Orie Bryant, the widow of the deceased, and by Mason H. and Arthur L. Bryant, the infant children of the deceased, fixing the same at such sum as would equal the probable earnings of the de- [fol. 162] ceased, M. L. Bryant, taking into consideration the age, business capacity, experience, habits, health, energy, and perseverance of the deceased, during what would probably have been his lifetime if he had not been killed;

2. By adding thereto compensation for the loss of his care, attention, and society for his wife and children;

3. By adding such further sum as they may deem fair and just by way of solace and comfort for said wife for the sorrow, suffering, and mental anguish occasioned to her by his death, the damages to be fixed at not more than ($10,000.00) Ten Thousand Dollars, the amount claimed in the declaration; and

4. The Court tells the jury that in ascertaining the possibility of the lifetime of the deceased, the jury have the right to determine the same with reference to recognized scientific tables relating to the expectation of human life.

And I may add that when you go to your room to consult of your verdict you will not consider at all whether the railway company is liable, you will consider this question, if the railroad company is liable, how much ought they to pay, and put that into your verdict, and I have made out a form

of verdict which will be handed to you along with the instructions of the Court. Counsel will now want to talk to you a little while as to what we call the measure of damages or the amount of damages that they contend you ought to allow. This is a case, in which the railroad company, as we call it, demurs to the evidence, that is, they put it up to me to say whether or not the railway company is liable and up to you to say how much you think they ought to pay.

[fol. 163] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 164] Minute entry of argument and submission September 15, 1927, omitted in printing.

[fol. 165] IN SUPREME COURT OF APPEALS OF VIRGINIA, AT STAUNTON

THE CHESAPEAKE AND OHIO RAILWAY COMPANY

v.

BRYANT'S ADMINISTRATOR

OPINION—Jan. 19, 1928

MARTIN P. BURKS, J.:

For some years prior to August 31, 1925, Marshall L. Bryant and Con F. Dodson had been working together as section hands on the Chesapeake and Ohio Railway. On the date mentioned, Dodson, who was acting foreman of the gang, shot and killed Bryant, and this action was brought by Bryant's administrator against the railway company to recover damages for his death.

There were two counts in the declaration, one charging that Bryant was an employee of the defendant, and that the killing by Dodson was "in the course of his employment or within the scope of his authority," and the other that Dodson was an unfit and dangerous person to act as

foreman, and that the death of the intestate was caused by the defendant's negligence in employing and keeping Dodson in the service, when it knew, or ought to have known, that he was an unfit and dangerous person to be in charge of its section hands.

When the evidence was all in, the defendant demurred to [fol. 166] the evidence, and the plaintiff joined therein. The jury assessed the plaintiff's damages at $8,000, and the trial court overruled the demurrer, and entered up judgment for the plaintiff against the defendant for the $8,000 and the costs.

The homicide took place on Monday in the presence of a number of witnesses who testified in the case, and there is some variation in their testimony as to what took place at the time of the shooting, but the variations can not properly be called conflicts, and it is said that the defendant did not by his demurrer waive these conflicts. This may be true, but, on a demurrer to the evidence, the demurrant is taken as admitting all inferences that a jury might fairly draw in favor of the demurree from his evidence. If an inference favorable to the demurree might be fairly drawn from any portion of his evidence though that evidence was not entirely harmonious and consistent, the jury may draw it, and whatever inference the jury might have fairly drawn, the court must draw.

Viewing the case from the standpoint of the demurrer to the evidence, there was evidence to support, and the jury might have found the following as the principal facts of the case: The defendant, the plaintiff's intestate and Dodson were all engaged in interstate commerce at the time of the discharge of the intestate. On Saturday before the [fol. 167] homicide, Dodson was foreman of the section gang, and the intestate was a workman under him, employed by the day, and that Dodson had authority to discharge Bryant, and did, in fact, discharge him; that on Monday morning, at the usual hour to commence work, Bryant went to the section house from which they were to start, carrying his dinner bucket with him; that the lever-car to carry the men and tools to the place of work was placed on the track; that Bryant put his dinner bucket on the car and went to the tool-house and got a pick or shovel and placed that on the car; that at this juncture Dodson ordered Bryant away in language variously expressed by the witnesses, such

as, "I ain't got anything for you to do"; "Go on away, I told you, Bryant, I wouldn't work you any longer"; "Fellow, I don't need you any longer"; "I have just fooled with you long enough, you get away from here"; "I told you I wasn't going to work you any more, just get on up the road"; that Bryant did not leave; that Dodson drew his pistol and Bryant asked him what he was going to do with it, and remarked that he would make him eat it; that Bryant was standing at the opposite end of the car from Dodson, but did not make any advance towards him, or any effort to strike him, but stood there with his hands down, [fol. 168] with gloves on them, and was not armed in any way; and that Dodson fired several shots at Bryant at a distance from eight to twelve feet, and that Bryant died from his wounds three days thereafter. There was also abundant evidence to justify a finding by the jury that Dodson was a nervous, quick tempered man, hard to get along with and unfit to have charge of a section force, but not that he was dangerous, or that such was his reputation in the community. It also appears that Long, the foreman who appointed Dodson his substitute in his absence, knew of Dodson's disposition, and that he carried a pistol.

It is admitted by the plaintiff's counsel that, at the time of the shooting, the defendant and Dodson were engaged in interstate commerce; that the intestate was also engaged as a laborer for the defendant up to the time of his discharge; that the Federal Employers Liability Act applies to employees so engaged and is the exclusive law applicable to employees so engaged; and that said act is applicable only to negligent acts by which such employees are injured, and does not apply to wilful injuries. Whether or not the Federal act, therefore, is applicable is dependent on whether Bryant was an employee of the defendant on Monday, August 31, 1925, the day of the shooting.

[fol. 169] Bryant was employed by the day, and either party had the right to terminate the service at will, without notice. Dodson, it is clear from the testimony, had the right to discharge him, and, independent of any other evidence in the case, Dodson testified that he discharged him on the previous Saturday. On a demurrer to the evidence, this fact must be accepted as established. It is unnecessary, therefore, to make any further reference to the able

argument of counsel and the cases cited by them, on the questions above mentioned. Counsel agree, except as to the time of the discharge, and this is concluded, on a demurrer to the evidence, by the testimony of Dodson. There are no conflicts of evidence on a demurrer to the evidence. The concessions made by the demurrer eliminate the conflicts. Bryant was not an employee of the company at the time of the shooting.

The case, therefore, is controlled by the State statute.

The chief question involved is, was Dodson acting "in the course of his employment or within the scope of his authority" when he shot Bryant?

We have no evidence of what took place on Saturday but the testimony of Dodson, a witness called by the plaintiff, except as hereinafter stated. He testified that when they [fol. 170] quit work on Saturday, "I walked down the track and he walked up beside me. He said, 'are you going to town this evening?' I said I had thought I would, and he just made the remark, he said, 'I want to see you when I get to the tool house. I am going to beat hell out of you.' I said, 'Marshall I don't want any trouble with you,' and I said 'after this evening remember I don't work you any more.' I said 'you don't work any more after this evening.' "

"Q. What was his reply?

"A. He just made the remark, 'if you cause me to lose my job, I will kill you.' "

There was testimony also of a threat made by Bryant against Dodson on Monday morning before the shooting, but there is no evidence that this threat was communicated to Dodson.

Dodson's account of what took place on Monday morning was as follows:

"Q. Now tell me what occurred on Monday morning when you started off with your tool car?

"A. He was getting his stuff out and I said, 'Marshall, I have refused to work you any more.'

"Q. Had Bryant brought his tools or anything to the tool [fol. 171] car at that time?

"A. He went to the tool house and got a pick and brought it out. I said, 'I refuse to work you.'

"Q. Then tell what occurred.

"A. He says, 'I don't pay no attention to you. Mr. Long will have to tell me.'

"Q. Who was Mr. Long? The regular section foreman?

"A. Yes, sir.

"Q. Go ahead and tell what happened.

"A. He just made the remark, he said, 'I will give you what I promised you,' and started on right around the car to me. When I drew my gun he said, 'What are you going to do with that damn thing? I will make you eat it.'

"Q. When he said, 'Mr. Long hired me and will have to fire me,' or words to that effect, where was he standing? Where was Bryant standing?

"A. He was coming around the car to me.

"Q. And you were on the track by the side of the car?

"A. I was on the west bound side.

"Q. The car was between you two?

"A. It was at the time he first came out and he came [fol. 172] right on around the east end of it.

"Q. You say he had started to come towards you?

"A. He was coming around the car to me.

"Q. And said he would do to you what he had promised?

"A. Yes, sir.

"Q. What did you say?

"A. I never said anything.

"Q. What did you do?

"A. I drew my gun.

"Q. You came there that morning with a gun in your pocket?

"A. Yes, sir.

"Q. And you drew it. Did Bryant stop when you drew the gun?

"A. No, sir.

"Q. What did he do?

"A. He just said, 'What are you going to do with that damn thing? I will make you eat it.'

"Q. What did you do then?

"A. I put it to work.

* * * * * * *

"Q. At the time you told Bryant on Saturday you [fol. 173] wouldn't work him any more, was anybody else near you?

"A. No, sir. We was walking down the track alone. The rest of the crew was back up the track.

* * * * * * *

"Q. I understand you had no ill feeling against this man Bryant?

"A. No, sir, I did not.

"Q. If you don't have any ill feeling against him why did you shoot him?

"A. Well, except he made those threats I was just protecting myself."

Other witnesses for the plaintiff give in detail what occurred at the time of the shooting. Quite naturally some of them recalled things that others did not, but piecing together what any and all of them recalled, their account of what transpired was substantially as follows: About seven o'clock on Monday morning, when the gang were about to start out from the tool-house, Bryant came to the tool-house with his dinner-bucket, and Dodson said to him, "I haven't got anything for you to do." Apparently Bryant did not hear him and went to the tool-house and got his tools and [fol. 174] brought them and placed them and his bucket on the lever-car, and was ready to step on the car when Dodson told him again he didn't have anything for him to do, and to "get away from here." Bryant did not go but said, "I will give you what is coming to you this morning," but was not in striking distance of Dodson and did not advance towards him. Dodson then pulled his pistol and pointed it at Bryant, and Bryant said, "What are you going to do with that thing? I will make you eat that thing," and immediately Dodson began shooting. We have no detailed account of what was the origin of the trouble resulting in the dismissal of Bryant on Saturday. Only one other witness besides Dodson refers to what took place on Saturday. This witness testified that he heard Dodson tell Bryant on Saturday, "If you keep on yapping around here, you won't have anything to do."

The case is one of great difficulty. Courts have gone so far in holding masters, especially corporations, liable for the wilful, malicious or intentional wrongs of their servants that it is difficult to ascertain the safe and proper line of demarcation between liability and non-liability of the master. No general rule on the subject has yet been formulated, and it is generally said that each case must be decided on its own facts and circumstances, considering the [fol. 175] character of the employment and the nature of the wrongful act. 18 R. C. L. 796.

There are cases where the departure of the servant from the service he was engaged to perform is so manifest that reasonable men could not differ in opinion upon the subject. On the other hand, there are cases where it is equally plain that there has been no such departure. Kidd v. De Witt, 128 Va. 438; Richie v. Waller, 63 Conn. 162, 38 Am. St. Rep. 361; Pittsburgh &c. R. Co. v. Kirk, 102 Ind. 399, 52 Am. Rep. 675. Between these two lies the great body of cases where the liability of the master is dependent upon whether or not the act of the servant was within the scope of his employment, and the evidence is such that fair minded men might entertain different opinions. This class of cases presents a question of fact to be determined by a jury under proper instructions from the court.

Scope of employment means in the course of the employment and in furtherance of it. If the act of the servant is done while the servant is engaged in the master's business, and with a view to the furtherance of that business and the interest of the master, it is within the "scope of the employment," and the master is liable whether the act of the servant was done negligently, wantonly or wilfully. Rounds v. Delaware &c. R. Co., 64 N. Y. 128; Huffcut, Agency, sec. 252, pp. 306-7.

[fol. 176] Some of the earlier cases held that the master was not liable for the malicious and intentional torts of the servant, although committed in furtherance of the master's business, on the ground that the wilfulness or malice, of itself, established a departure from the service, and that the servant was acting upon some independent and personal motive of his own. Wright v. Wilcox, 19 Wend. (N. Y.) 343, Huffcut, Agency, sec. 306, and cases cited. But this doctrine

has been long ago repudiated, and the current of authority is to the effect that the liability of the master is determined by whether or not the wrongful act of the servant was done while in the employment of the master and in furtherance of it, or the servant had stepped aside from his employment and done an independent and individual wrong. If the wrong done by the servant is of the former class the master is liable, whether it was done wilfully and intentionally or carelessly and negligently; if of the latter, the master is not liable. McCarthy v. Tenimins, 178 Mass. 378, 86 Am. St. 490; Holler v. Ross, 68 N. J. L. 324, 96 Am. St. Rep. 546; Bryan v. Adler, 96 Wis. 124, 65 Am. St. Rep. 99; Nelson Business College v. Lloyd, 60 Ohio St. 448, 71 Am. St. Rep. 729; Palatty v. Charleston &c. R. Co., 67 S. C. 391, 100 Am. St. Rep. 750. Note 16 R. C. L. 800, citing many cases; Note 54 Am. St. Rep. 750. The basis of the rule is [fol. 177] that the master has placed the servant in his place, and so long as he acts within the scope of his employment, his acts are the acts of the master, whether done negligently or wilfully. But, as said in Holler v. Ross, supra, "The rule, as it is now established by the later judicial declarations, should be held strictly within its defined limits. It is a rule capable of great abuse and much hardship, and the courts should guard against its extension or misapplication." It is further said in that case, "Where it appears, when the plaintiff rests his case, that the act of the servant was a wilful one, and was not, expressly or impliedly, within the line of the servant's duty or employment, there should be a nonsuit."

We approve what is stated above as the current of authority, and we also approve the caution suggested by the New Jersey court in Holler v. Ross supra.

When Bryant went to the tool-house on Monday morning, he did not go there as a trespasser. He did not consider the discharge on Saturday as final, and on his way there he said he expected that Dodson would discharge him. Dodson was only a temporary foreman, and when he ordered Bryant off, the latter inquired for Long, the permanent foreman who had employed him, and when in- [fol. 178] formed by Dodson that Long was at home, he said, "I will go over and see him. He hired me and if he wants to fire me, he can fire me." Under these circum-

stances, Bryant cannot be said to have been a trespasser in going to the tool-house, but he became such when informed of his prior dismissal and refused to leave. It is said, however, that Dodson was "not authorized to eject or expel trespassers." The only evidence relied on for this statement is what was said by Long in his testimony. He testified as follows: "Q. Did you give Dodson any authority to police or guard the railroad tracks against trespassers? A. No, sir, he had none." He had already testified that before leaving on the Thursday prior to the shooting, he called Dodson down and put him in charge of the gang, and was asked to "state to the jury what you told Dodson to do," and his reply was, "to look after the general condition of the track" and other details as to the work, but not one word as to his men, trespassers or other persons. The question and answer quoted could only mean that he conferred no authority upon him further than to make him foreman pro tem. As to general trespassers, it does not appear that Long had any authority himself. But a foreman who has charge of a gang of men and who is invested with the power of discharging them, necessarily has the power to require one whom he has discharged to [fol. 179] leave the premises, and, if he refuses, he may use such reasonable force as is necessary to effect his removal. This power is necessarily implied from the nature of the authority given to him. Roghan v. Moore Mfg. Co., (Wis.) 43 N. W. 669.

While Dodson may not have had authority to remove trespassers generally, he did have authority to discharge Bryant, and when he appeared Monday, under the circumstances stated, and was ordered off just as he and another one of the gang "were ready to step on the end of the car," Dodson had the right to use reasonable force to remove him, but the force used was far in excess of the necessity or propriety of the situation.

The case was heard in the trial court on a demurrer to the evidence, and upon the evidence the jury might have found that the shooting was done by Dodson while in the employment of the defendant and in furtherance of such employment and not wholly from personal motives of Dodson, and consequently we must so hold.

The right to remove Bryant, without unnecessary force, was incident to the right to discharge him, and for the

tortious manner in which the removal was effected the defendant is liable. Myers v. Lewis, 121 Va. 50.

Several Virginia cases have been cited in support of the plaintiff's right of recovery. Two of them are not in point [fol. 180] on account of the great difference in the facts, though the opinions contain expressions bearing on the present discussion. In Dupont v. Snead, 124 Va. 177, the servant was discharging the very duty he was employed to perform, and the wilful act was plainly in furtherance of the employment. In Crowell v. Duncan, 145 Va. 489, the wrongful act was unintentional. Davis v. Merrill, 133 Va. 69, accords with the current of authority. The facts of that case are stated in the opinion as follows:

"About one o'clock a. m. on October 11, 1919, the plaintiff's intestate, in company with several others in an automobile, was returning from Ocean Park to her home in Norfolk. When they arrived at the Norfolk and Western Railroad crossing on Brambleton avenue, they were stopped by the closed gates, although no train was approaching. After being called several times, the gateman, Branch A. Ford, came out of a near by storehouse with a lantern in his hand. The chauffeur asked him to please raise the gates, to which he replied, 'there is other crossings you can go over besides this one.' The chauffeur told him he didn't have time to go all over town looking for crossings, when there was no train standing there and no train approaching. Ford then left, going towards the tower and started up, mumbling something the driver could not un- [fol. 181] derstand.

"As soon as he entered the tower box he raised the gates and as the car was leaving the wood part of the crossing Ford fired three pistol shots at the rear of the car, in quick succession, one of which struck Claudia Harrell in the back, giving her a wound from which she died shortly thereafter in a Norfolk hospital.

"Ford was arrested a few hours later under a warrant charging him with murder. The officers who made the arrest and all other witnesses who saw him that night and next day, except J. T. Routten, testified that he talked and acted as a sane man, and that they saw nothing strange in his conduct. Routten thought he acted strange, and he appeared to him to be upset mentally.

"On January 21, 1920, Ford was adjudged insane and committed to the Southwestern State Hospital for proper care and observation, with instructions to the superintendent to inform the Corporation Court of the city of Norfolk from time to time of his mental condition.

• • • • • • •

"The plaintiff rests the liability of the defendant on two grounds:

"1. 'That the killing of the plaintiff's intestate by the [fol. 182] defendant's employee arose out of and was a part of a transaction between the plaintiff's intestate and the defendant company, in which the gateman, Ford, was acting for the defendant company, said transaction being within the scope of the gateman's employment.' And

"2. 'That the defendant company was responsible for the employment of a servant of the character of the gateman, when it not only knew by reason of its previous discharge of him, but might further have known by the exercise of ordinary care, that he was an incompetent and dangerous person to entrust with duties of the character in question.' "

The company was held liable for the injury. In the course of the opinion it is said: "If a person, acting for himself, wilfully and maliciously inflict an injury upon another, he is liable in damages for such injury. And there is no reason why a master should be permitted to turn his business over to servants who have no regard for the public welfare and thereby escape the responsibility which he would otherwise have to bear. It is manifestly right and just that both corporations and individuals be required to answer in damages for wanton and malicious assaults inflicted upon others by their servants, while acting within the [fol. 183] scope of the servant's employment and duty, and it matters not whether the act of the servant is due to a lack of judgment, the infirmity of temper, or the influence of passion, or that the servant goes beyond his strict line of duty and authority in inflicting such injury; and the authorities so hold." The authorities relied on are cited in the opinion and need not be repeated.

In addition to the authorities cited in that case, and those hereinbefore cited, we wish to refer especially to Roghan v. Moore Mfg. Co., (Wis.), 43 N. W. 669, hereinbefore cited, which bears a striking resemblance to the instant case. There the plaintiff was employed by the defendant's foreman, who had the power to discharge him. Upon refusal to do certain work, the foreman discharged him, and ordered him to leave the premises at once. The plaintiff replied that he would leave when he got ready, and the foreman forcibly pushed or kicked the plaintiff, and he fell down and broke his leg. He thereupon sued the master. The defendant defended on the ground that the acts of the foreman were not within the scope of his employment, but the court said:

"It is said the master is responsible for the acts of his servant only where such acts are committed within the scope of the servant's authority, or where the master sanctions and ratifies the servant's act. If the foreman was [fol. 184] authorized by the company to discharge workmen, he might lawfully use such reasonable force as was necessary to remove the discharged men from the shop. This would be necessarily implied from the nature of the authority given to him. There has been much discussion in the courts as to how far the master is liable for the torts of his servant, and many nice distinctions have been made; but it is generally agreed that for the negligent or wrongful acts of the servant in the line of his duty, for which the master would be liable if the act were done by himself, the master is responsible. This principle is illustrated and applied in numerous cases found in the books. Now, suppose the corporation had been a natural person, who had selected a foreman, and given him authority to forcibly eject a workman from the shop who refused to leave when ordered to do so; and, if the principal might use necessary force to eject the discharged man, could not the foreman in charge of the shop do the same thing, and would it not be in the scope of his employment so to act? It seems to us the question must be answered in the affirmative. * * *

"It seems to us that, under the circumstances, the company should be held responsible for the injury which the foreman did while in the charge of the shop and in the exercise of the authority implied in his employment. It is

[fol. 185] conceded that, wherever the master has authorized the use of force for the accomplishment of an object, or where he could himself have lawfully used a certain degree of force for the accomplishment of such object, so that the authority of the servant in using force could be implied, the master is liable if the servant, through excess of zeal, misjudgment, or passion, use an excess force, and does an injury. We are clearly of the opinion that the foreman acted within the scope of his employment in removing the plaintiff from the shop, and that, if he executed the commands of his master with brutality, and not with due care and consideration, the master is responsible for his act."

Attention has been called to Atlantic Coast Line R. Co. v. Southwell's Admr. (October 31, 1927), 48 Sup. Ct. 25. In that case one employee of an interstate railroad shot and killed another employee of the road, and it was sought to impose liability on the railroad company on the ground that a superior employee of the two had negligently failed to prevent the killing, and it was held that such negligence was not shown by the evidence. The court said: "It would be straining the language of the act somewhat to say, in any case, that wilful homicide 'resulted' from the failure of some superior officer to foresee the danger and to prevent it. In this case, at all events, we are of opinion that there is no [fol. 186] evidence that warrants such judgment." There is nothing in the case that militates against the views we have expressed.

Upon the authorities cited, a jury would have been warranted in finding that the shooting by Dodson was in the course of his employment and in furtherance of it. On the other hand, they might well have found that it was wholly on consequence of a personal quarrel between the two men. In other words, it was a jury question, and where that is the case, the penalty for demurring to the evidence is a decision in favor of the demurree.

It is earnestly insisted by the able counsel for the railway company that there can be no judgment for the plaintiff because there is a variance between the allegation and the proof, that it is alleged in the declaration that Bryant was an employee of the defendant at the time of the shooting, while the testimony shows that he was not, that he had

been discharged on the previous Saturday. If this objection had been made at the time the evidence was offered of the discharge on Saturday, it is probable that the plaintiff would have asked leave to amend his declaration so as to conform to the proof, and the amendment would have been permitted and the case have proceeded without delay, but no such objection was made. The case proceeded as if such [fol. 187] amendment had been made, and all of the evidence was introduced that probably could have been offered under such an amendment. The case was fully and fairly tried on its merits and substantial justice has been reached. The case comes within section 6331 of the Code, declaring that no judgment shall be reversed "for any error committed on the trial where it plainly appears from the record and the evidence given at the trial that the parties have had a fair trial on the merits and substantial justice has been reached." This statute is very comprehensive. Rinehart & Dennis Co. v. Brown, 137 Va. 670, 681.

Having reached the conclusion that the defendant is liable under the first count in the declaration, it becomes unnecessary to consider the question of liability under the second count.

We are of opinion to affirm the judgment of the trial court.

Affirmed.

[fols. 188 & 188½] In Supreme Court of Appeals of Virginia

The Chesapeake and Ohio Railway Company, Plaintiff in Error,

vs.

R. L. Bryant, Admr. of M. L. Bryant, Decd., Defendant in Error

Judgment—Jan. 19, 1928

This cause, which is pending in this Court at its place of session at Staunton, having been fully heard but not determined at said place of session; this day came here the

parties by counsel, and the Court having maturely considered the transcript of the record of the judgment aforesaid and arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that there is no error in the judgment complained of. It is therefore considered that the same be affirmed, and that the plaintiff in error pay to the defendant in error damages according to law, and also his costs by him expended about his defence herein.

Certificate to foregoing paper omitted in printing.

[fol. 189] IN SUPREME COURT OF APPEALS OF VIRGINIA

[Title omitted]

PETITION OF THE CHESAPEAKE & OHIO RAILWAY COMPANY FOR REHEARING

To the Honorable Judges of the Supreme Court of Appeals of Virginia:

Your petitioner, The Chesapeake & Ohio Railway Company, respectfully prays that the Court will rehear its judgment, entered in the above entitled matter on the nineteenth day of January, 1928, affirming the judgment of the Circuit Court of Alleghany County in favor of M. L. Bryant's Admr., and against your petitioner.

The grounds upon which the rehearing is prayed are:

I

The Court has held that the plaintiff's intestate was discharged from the defendant's service on Saturday, August 29, 1925; that the section foreman's implied right to remove Bryant, thus discharged, from the master's premises, inci-
[fol. 190] dent to his authority to discharge, persisted over a space of two days after the discharge, including an intervening day's work from which the discharged employee was absent, until the time of the shooting, August 31, 1925, and that the defendant's foreman did the shooting in the exercise of such implied authority.

It is respectfully submitted by the defendant that such implied right to remove the discharged employee from the master's premises, which is merely incident to the act of discharge, could not continue after August 29th, when the intestate was discharged and actually left the defendant's premises, through an intervening day of work from which the discharged employee was absent, until on the second day thereafter the discharged employee returned to the premises.

II

The Court in its opinion lays stress upon the defendant's failure to object, for variance, to Dodson's evidence that the intestate was discharged two days before the shooting, and not as averred in the declaration, and in substance and effect holds that such failure to object enlarged the plaintiff's pleadings and that accordingly the case comes within the provisions of Sec. 6331 of the Code, but it has failed to note the defendant's motion and exception shown below.

(a) The petition calls attention to the trial court's order entered October 22, 1926 (Rec., pp. 23-4), to the pleadings therein referred to, and to the defendant's exception therein noted, by which it is shown that the petitioner has waived no right, that the averments of the declaration have not been enlarged, and that the plaintiff, when the opportunity offered, did not amend his declaration.

The plaintiff's declaration (Rec., p. 19) distinctly averred that the intestate on the day of the shooting was the defendant's employee and had begun his day's work as its servant at the place where he was employed to work, that he was discharged and after such discharge did not leave the prem-[fol. 191] ises immediately, whereupon the defendant's foreman shot him, and the legal duty averred, the breach of which was complained of, was that of master to servant.

The defendant pleaded not guilty and also filed a special plea (Rec., p. 22) that the defendant and the plaintiff's intestate at the time of the supposed commission of the grievances complained of were engaged and employed in interstate commerce and that the intestate's injury was not inflicted and his death did not result in whole or in part from the negligence of any of the officers, agents or em-

ployees of the defendant; to which special plea the plaintiff filed his replication (Rec., p. 24), alleging that at the time of the happening of the mischief complained of in the declaration the intestate was not in the employment of the defendant and was not engaged in interstate commerce. The defendant moved the court to strike out and reject the replication on the grounds that it was bad for duplicity and that "said replication departs from the plaintiff's case as he has declared it" (Rec., p. 25).

The Court, as appears from its order (Rec., p. 24) overruled the motion to strike out the replication on the ground that it was bad for duplicity and "that it is a departure from the plaintiff's case as he has declared it," and "the defendant thereupon excepted."

Two issues were tried, one the general issue, the other upon the special plea and the replication, under which last replication Dodson's evidence, under said ruling of the Court, duly excepted to, was admissible. Said evidence disproved the averments of the declaration, and upon a demurrer to the evidence entitled the defendant to a judgment in its favor.

It is submitted that said replication did not and could not amend the declaration; that the record shows due exception to the action of the court taken by the defendant; that it has not waived any right and that it is entitled to the benefit of the fundamental rule, sanctioned by repeated decisions of the Court and not altered by statute, that a plaintiff may recover, if at all, only upon the case made by his pleadings.

[fol. 192] (b) By the opinion and judgment of the Court the plaintiff is permitted in the same suit to occupy successive inconsistent positions, and to have judgment on a state of facts negativing the case made by this declaration.

III

It is held by the Court that Dodson had "authority to discharge Bryant, and when he appeared Monday, under the circumstances stated, and was ordered off just as he and another of the gang 'were ready to step on the end of the car,' Dodson had the right to use reasonable force to remove him." It must follow that Bryant, discharged employee, had the correlative right necessarily incident to

the existence of such right in Dodson and his employment, peacefully to leave the master's premises, and, if removed therefrom, to be removed without unreasonable force; which implied right corresponded to and of necessity was co-extensive in time with his superior's said right, after discharging, to require him to leave and to use reasonable force to remove him.

Dodson's right, incident to his exercise of the authority to discharge, is held to relate back to his act of discharging Bryant; the intestate's right likewise and to an equal degree must relate back and be incident to his employment and his discharge therefrom.

The evidence is without conflict and conclusive that the intestate's employment at the time of his supposed discharge on Saturday was exclusively interstate. The federal employer's liability act governs in such case and under it there can be no liability upon the defendant.

IV

There is no evidence in the record that the intestate refused to leave the defendant's premises or that foreman Dodson attempted to remove him. There is uncontradicted evidence that Dodson was not authorized to eject or expel trespassers (Long, Rec., p. 147) and both Long (Rec., p. 146) and Crance, Supervisor of Tracks, testified fully (Rec., p. 141) as to his duties.

[fol. 193] It is respectfully submitted that it was incumbent upon the plaintiff to prove his averment that Dodson shot the intestate in the course and scope of Dodson's employment. There was no evidence that the shooting was a part of the discharge, which discharge the Court holds occurred two days prior thereto, and judgment should not be given for the plaintiff without any evidence to prove such connection. The mere fact that the shooting grew out of the discharge can not impose liability upon the defendant.

V

In its opinion the Court says that it appears that Long, the foreman who appointed Dodson as substitute, knew that Dodson carried a pistol. There is no evidence that

Dodson carried a pistol while he worked with other men, and the only evidence regarding carrying a pistol is that of Long (Rec., pp. 147, 148, 157) that six months before the shooting, during the preceding winter, while Dodson was acting as night watchman at Moore's Tunnel he carried a pistol, Long expressly stating that this was during the preceding winter and "when he was not in charge of any body of men."

VI

The Court holds that when Bryant went to the tool house on Monday morning he did not go there as a trespasser, did not consider the discharge on Saturday as final, and on his way there said he expected that Dodson would discharge him, and that under these circumstances Bryant cannot be said to have been a trespasser in going to the tool house but became such when informed of his prior dismissal and refusal to leave.

Your petitioner shows that under the evidence and the opinion of the Court in this respect Bryant was entitled, as an employee, to a reasonable opportunity to leave the premises, that he was employed in interstate commerce, and that the only law appliable to this case is the federal employer's liability act, under which there can be no recovery except for acts of commission or omission negligently done.

[fol. 194] And your petitioner submits that it has been deprived in this respect of its rights and immunities under the said federal statute.

VII

The defendant under the pleadings and proof in this case had the right to insist and insists that its relations to the intestate were and are governed exclusively by the federal employer's liability act, and that in imposing liability upon it for the death of said intestate it has been and is deprived of its rights and immunities under said federal statutes.

The petitioner asks that the following matters be considered in connection with the first three grounds specified upon which a rehearing is asked.

I

The rule enunciated by the Court that the implied incidental right of a foreman, authorized to discharge an employee, persists for two days after the discharge has been effected, is of grave importance to the petitioner.

In its opinion the Court finds that the actual discharge occurred on Saturday afternoon. Bryant thereafter left the defendant's premises and there is no intimation that he required to be removed. He left making the specific threats to Dodson, "I want to see you when we get to the tool house. I am going to beat the hell out of you," "If you cause me to lose my job I will kill you" (Rec., p. 88), but Dodson did not accompany him, and thus in all probability avoided the very occurrence which took place the following Monday.

The discharge had been effected and the discharged employee had left the premises, and nothing could require the exercise then or the incidental right to remove Bryant from the premises. Bryant did not appear at the work during Sunday, but again came on the premises Monday.

In the case of Rogahn v. Moore Mfg. Co. (Wis.), 48 N. W. [fol. 195] 669, to which the Court refers as bearing a striking resemblance to the instant case, the foreman discharged Rogahn and directed him to leave the shop at once, and when Rogahn replied that he would do so as soon as he got ready, the foreman, to hasten plaintiff out of the shop, assaulted and struck him and caused him to fall. The order to leave the premises and the foreman's assault were in immediate sequence. They constituted a single transaction. There was no interval of two days' time as in the present case. In this most important respect the cases are entirely dissimilar.

Even in cases involving a carrier and its passengers, the lapse of a clear interval of time between the act done in the discharge of his duty and the servant's subsequent assault upon the passenger is held conclusively to exonerate the carrier from liability.

Central R. Co. v. Peacock, 69 Md. 257, 14 Atl. 709, 9 Am. St. Rep. 425;

Zeccardi v. Yonkers R. Co., 190 N. Y. 389, 83 N. E. 31, 17 L. R. A. (N. S.) 770;

McGilvray v. West End St. R. Co., 164 Mass. 122, 41 N. E. 116;
McQuerry v. Metropolitan St. R. Co., 117 Mo. App. 255, 92 S. W. 912.

There is an entire absence of evidence here that the foreman had the authority to eject a discharged employee from the master's premises, either expressly given him by the master or of usage or custom to that effect. It is only by legal implication that the right to require the employee to leave the premises exists as incident to the authority to discharge, for which reason, if for no other, it must be in continuous sequence to the authorized act.

It is submitted that since the authority to discharge was exercised Saturday and the intestate then left the defendant's premises, the right again on Monday to require the intestate to leave could not exist as incident to his employment. If this right could again spring into existence on Monday, two days afterwards, when Bryant appeared on [fol. 196] the premises, there is no limit to its duration and Dodson, without the defendant's authority or interposition, is constituted guardian of its premises.

II

Although his declaration averred the breach of a duty of master to servant, that the intestate was on the defendant's premises as an employee and in the defendant's employment immediately preceding the shooting, and that he was shot when he did not leave the premises immediately after his discharge, the evidence of Dodson was that the intestate was discharged two days before the shooting—which evidence, if taken to be true, precluded the plaintiff's recovery upon the case made by his declaration.

That this evidence was introduced by the plaintiff without objection by the deefndant on the ground of variance, whereby the plaintiff could have had an opportunity to amend his declaration, in the opinion of the Court enlarged the plaintiff's pleadings and permits him to recover under the provisions of Sec. 6331 of the Code, on a case not made by his declaration.

But it appears from the record and the exception then taken by the defendant to the ruling of the Court on its

motion to strike out the replication to its special plea that the defendant could not have objected to the evidence because of such variance that such objection would be mere repetition of an objection already expressly made and overruled, and that the plaintiff, at the time of the objection actually made, could have amended and did not do so.

The plaintiff's replication to the special plea made the issue that "at the time of the happening of the mischief in the declaration complained of and the said plaintiff's intestate was not, as in the defendant's special plea alleged, in the employment of the defendant." The Court had ruled that this replication did not depart from the case averred in the declaration, although, in the opinion of counsel for the defendant, it was absolutely inconsistent with that case [fol. 197] and negatived it completely. The defendant excepted to the trial court's ruling. The evidence referred to by the Court in its opinion, that the plaintiff's intestate had been discharged on the Saturday preceding the happening of the mischief in the declaration complained of, clearly supported the plaintiff's replication, and was admissible, if the trial court's ruling was correct. No objection made by the defendant on the ground of variance would have been sustained. The defendant was not required to repeat its objection already made and overruled, in order to preserve its rights. In not going through the idle formality of presenting its objection when the evidence was introduced and excepting to the court's refusal to exclude it, the defendant did not waive its objection and should not now be prejudiced in a matter in which it had no possible option.

It is submitted that to permit the pleadings to be enlarged by this evidence, so as to be a clear negation of and entirely inconsistent with the plaintiff's case as made by his declaration, is in contravention of two fundamental rules, sanctioned by repeated decisions of the Court, namely:

The plaintiff cannot allege one set of facts in his declaration and recover upon proof of an entirely different set of facts. The plaintiff may recover, if at all, only upon his case as pleaded.

Norfolk, etc., R. Co. v. Warden, 117 Va. 801, 804;
Atlantic, etc., R. Co. v. Caple, 110 Va. 514, 517.

A party is forbidden to assume successive positions in the course of a suit, in reference to the same fact or state of facts, which are inconsistent with each other and mutually contradictory.

Wessel Duval & Co. v. Crozet C. Co., 143 Va. 469, 473;
Alexander v. Comth., 137 Va. 477, 484;
Canada v. Beasley & Bros., 132 Va. 166, 174.

[fol. 198] III

If Dodson was acting within the scope of his implied incidental authority to require Bryant, without the use of undue force, to leave the master's premises, Bryant then had the indubitable correlative right to leave the premises, safe from violence.

If Dodson's implied incidental right related back to his exercise on Saturday of the power to discharge—and it must so relate back, or it could not be incidental thereto—Bryant's right likewise related back to his employment and his discharge therefrom.

The right of an employee to leave his master's premises with reasonable safety is a necessary incident of his day's work or of his discharge from his employment, as the case may be, and the law governing his exercise of that right is the same law which governs his employment.

It is proved, without conflict, that Bryant's employment on Saturday was interstate, just as it is proved and conceded that the work to be done on Monday was interstate.

Under such circumstances the state law cannot apply and the case is controlled exclusively by the federal employer's act, under which there can be no recovery.

For the reasons asigned, therefore, your petitioner respectfully prays that the judgment and decision above complained of may be reheard and reviewed, and judgment given as may be just and right in the premises.

And it will ever pray, etc.

The Chesapeake & Ohio Railway Company, by Its Attorney. J. M. Perry, Attorney for Petitioner.

[fol. 199] IN SUPREME COURT OF APPEALS OF VIRGINIA, IN RICHMOND

[Title omitted]

MINUTE ENTRY—Jan. 30, 1928

This day came the plaintiff in error, by counsel, and moved the court to set aside the judgment entered herein on the 19th day of January, 1928, and grant a rehearing; but, because the court here is not yet advised of its judgment to be given in the premises, time is taken to consider thereof.

A Copy. Teste: H. Stewart Jones, C. C.

[fol. 200] IN SUPREME COURT OF APPEALS OF VIRGINIA, IN RICHMOND

[Title omitted]

ORDER DENYING REHEARING—Mar. 28, 1928

On mature consideration of the petition of the plaintiff in error to set aside the judgment entered herein on the 19th day of January, 1928, and grant a rehearing thereof, the prayer of said petition is denied.

A Copy. Teste: H. Stewart Jones, C. C.

[fol. 201] IN SUPREME COURT OF APPEALS OF VIRGINIA, IN RICHMOND

[Title omitted]

ORDER SETTING ASIDE ORDER DENYING REHEARING—Mar. 29, 1928

On further consideration of the petition to rehear in this case which was denied on the 28th day of March, 1928, it is ordered that the said order and judgment be set aside and annulled, and the court takes further time to consider the same.

Which is ordered to be certified to the clerk of this Court at Staunton.

A Copy. Teste: H. Stewart Jones, C. C.
A Copy. Teste: H. H. Wayt, Clerk.
A Copy. Teste: H. H. Wayt, Clerk.

[fols. 202 & 203] In Supreme Court of Appeals of Virginia, in Wytheville

[Title omitted]

Order Granting Rehearing—June 25, 1928

The Court having maturely considered the petition of the Plaintiff in Error to rehear the judgment of this Court in this cause entered on the 19th day of January, 1928, is of opinion that it should be granted. It is therefore adjudged and ordered that the judgment aforesaid be, and it is hereby set aside and that this cause be reinstated upon the privileged docket of this Court at its place of session at Staunton for a rehearing thereof.

Which is ordered to be certified to the clerk of this Court at Richmond and to the Clerk of this Court at Staunton.

A Copy. Teste: J. M. Kelly, Clerk.
A Copy. Teste: H. H. Wayt, Clerk.
A Copy. Teste: H. H. Wayt, Clerk.

[fol. 204] In Supreme Court of Appeals of Virginia, in Staunton

[Title omitted]

Order Transferring Cause—Sept. 12, 1928

It is ordered that this cause which is pending here be forthwith transferred to the docket of this Court at Richmond, there to be heard and determined, and with that view it is ordered that the Clerk of this Court here transmit the records and papers of said cause to the Clerk of this

Court at Richmond. It is further ordered that a copy of this order be forthwith certified to the Clerk of this Court at Richmond.

A Copy. Teste: H. H. Wayt, Clerk.

A Copy. Teste: H. H. Wayt, Clerk.

[fol. 205] Minute entry of argument and submission March 13, 1929, omitted in printing.

[fol. 206] IN SUPREME COURT OF APPEALS OF VIRGINIA, IN RICHMOND

JUDGMENT—Mar. 21, 1929

This day came again the parties, by counsel, and the court having maturely considered the transcript of the record of the judgment aforesaid and arguments of counsel, and being equally divided in opinion as to the judgment to be entered in the premises, it is considered that the same be affirmed, and that the plaintiff in error pay to the defendant in error damages according to law, and also his costs by him expended about his defense herein.

Certificate to foregoing paper omitted in printing.

[fols. 207 & 208] Clerk's certificate to foregoing transcript and of no opinion omitted in printing.

[fols. 209 & 210] Judge's certificate to clerk omitted in printing.

Clerk's certificate to judge omitted in printing.

Endorsed on cover: File No.—. Virginia Supreme Court of Appeals. Term No. —. The Chesapeake & Ohio Railway Company, petitioner, vs. R. L. Bryant, administrator of the estate of M. L. Bryant, deceased. Petition for writ of certiorari and exhibit thereto. Filed —— —, 19--. File No. —.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed June 3, 1929

The petition herein for a writ of certiorari to the Supreme Court of Appeals of the State of Virginia is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Endorsed:] Supreme Court of the United States, October Term, 192–. Order granting petition for certiorari.

FILE COPY

FILED
MAY 25 19
CHARLES ELMORE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1928.

No. ~~934~~ 113

THE CHESAPEAKE & OHIO RAILWAY COMPANY, PETITIONER,

v.

R. L. BRYANT, ADMINISTRATOR OF THE ESTATE OF M. L. BRYANT, DECEASED.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA AND BRIEF IN SUPPORT THEREOF.

J. M. PERRY,
Counsel for Petitioner.

(34,243)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1928.

No. 934

THE CHESAPEAKE & OHIO RAILWAY COMPANY, PETITIONER,

v.

R. L. BRYANT, ADMINISTRATOR OF THE ESTATE OF M. L. BRYANT, DECEASED, DEFENDANT.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA.

To the Honorable the Supreme Court of the United States:

Your petitioner, The Chesapeake & Ohio Railway Company, a common carrier engaged in interstate commerce, respectfully represents that it is aggrieved by a judgment of the Supreme Court of Appeals of Virginia, the highest court of the State of Virginia in

which a decision can be had, entered on the twenty-first day of March, 1929, in a certain action at law wherein petitioner was plaintiff in error and R. L. Bryant, Administrator of M. L. Bryant, dec'd, was defendant in error, which judgment, by an equally divided court and without opinion, affirmed a judgment of the Circuit Court of Alleghany County, Virginia, for the sum of $8,000, recovered by said Bryant's Administrator against your petitioner.

Summary Statement of the Matter Involved.

M. L. Bryant was a section laborer, employed in work of interstate character by your petitioner, an interstate carrier by railroad. While at work on your petitioner's premises he was dismissed from service by Dodson, your petitioner's section foreman. Immediately thereafter, before Bryant had moved from the place he stood when dismissed, Dodson shot and fatally wounded him.

The principal questions which arise on the record of this cause are: (1) Whether the Federal Employers' Liability Act (35 Stat. 65, U. S. Code, Ch. 2, sec. 51) applies to and governs the relations between the carrier and its employee, quitting work on the carrier's premises because he was dismissed, during the reasonable margin of time necessary to be used in passing from the premises where the work is being done; and (2) the right of such employee's administrator to recover under said statute for a wrongful, and not negligent, injury inflicted upon the intestate by the carrier's employee.

The said M. L. Bryant's administrator instituted this action for damages against your petitioner in the Circuit Court of Alleghany County, Virginia, under the Virginia statutes governing the liability of railroads to employees and death by wrongful act, which statutes permit a recovery for death caused by wrongful act as well as by negligence (see Appendix). Your petitioner, by appropriate pleading, set up as a defense that it was a common carrier by railroad engaged in interstate commerce, that the plaintiff's intestate was employed in such commerce at the time of the commission of the supposed grievance and that the intestate's injury did not result in whole or in part from the negligence of the petitioner's officers, agents or employees (Rec., pp. 22, 25). Thus the suit became one governed exclusively by the Federal Employers' Liability Act (35 Stat. 65, U. S. Code, Ch. 2, sec. 51) if the facts so pleaded were proved.

At the trial of the case in said Circuit Court of Alleghany County it appeared without question that your petitioner was such interstate carrier engaged in interstate commerce and that the intestate immediately prior to his injury was employed in work of interstate character (Rec., pp. 138, 46, 47, 87-88). It was also proved that, as the intestate was placing on a lever car tools he had brought from the petitioner's tool house, his foreman, who was authorized to dismiss employees working under him (Rec., pp. 141, 142) but was without authority to police or guard the petitioner's premises against trespassers (Rec., p. 147), told the in-

testate that he had no more work for him to do. The intestate asked his foreman's reasons and the whereabouts of the regular foreman (Dodson being acting foreman only), to whom he would appeal, whereupon the foreman repeated that he had no work for the intestate to do, ordered him to get away, drew a pistol, aimed it at the intestate and fired, fatally wounding him (Rec., pp. 103-104, 68-69). The whole affair occurred very quickly, and when the first shot was fired the intestate had not moved from where he stood when he was dismissed. There had been some difficulty between the intestate and foreman Dodson on the preceding Saturday—the shooting occurred on Monday—while the section force was engaged in like work. The intestate then had threatened to beat the foreman, the foreman had said, "After this evening remember I don't work you any more," and the intestate had replied, "If you cause me to lose my job I will kill you" (Rec., p. 88). Afterwards, on the same day, at quitting time, foreman Dodson had said to the intestate, "If you keep on yapping around here you won't have anything to do" (Rec., p. 61). Dodson testified that he discharged Bryant on Saturday (Rec., p. 85), but this was a mere conclusion from the facts above set out, was objected to by the defendant on this ground, the objection overruled and exception taken.

Your petitioner demurred to the evidence, especially insisting in its statement of the grounds of its demurrer that the petitioner was engaged and the intestate employed in interstate commerce at the time of the intestate's injury, that said injury did not result in

whole or in part from negligence and that no cause of action had accrued to the plaintiff against petitioner under the statute governing such employment and engagement in interstate commerce (Rec., p. 161). The trial court overruled the demurrer to the evidence and gave judgment against your petitioner, its decision thus being against the right, privilege or immunity under said federal statute, specifically claimed by your petitioner. The defendant excepted.

Under the Virginia practice the effect of a demurrer to the evidence is: "The party demurring is considered as admitting the truth of the adversary's evidence, and all just inferences which can be properly drawn therefrom by a jury, and as waiving all of his own evidence which conflicts with that of his adversary, and all inferences from his own evidence (although not in conflict with his adversary's) which do not necessarily result therefrom." *Johnson* v. *C. & O. Ry. Co.*, 91 Va. 171, 174; *A. C. L. R. Co.* v. *Wheeler*, 147 Va. 1, 17. The Court, however, is not obliged to accept as true what it knows judicially to be untrue. *N. & W. R. Co.* v. *Strickler*, 118 Va. 153, 155. And a demurrer to the evidence does not waive an objection to illegal or incompetent evidence, admitted over the demurrant's motion to exclude. *N. & W. R. Co.* v. *Warden*, 117 Va. 801, 804.

The Supreme Court of Appeals of Virginia having awarded a writ of error to, and having affirmed said judgment of, the Circuit Court of Alleghany County, by order entered on January 19th, 1928 (Rec., p. 176), delivering an opinion (Rec., p. 163), by order entered

on June 25th, 1928, reheard and set aside its said order of affirmance (Rec., p. 187).

On March 21st, 1929, said Supreme Court of Appeals of Virginia, being "equally divided in opinion as to the judgment to be entered in the premises" (Rec. p. 188), affirmed the judgment of the Circuit Court of Alleghany County but delivered no opinion.

Your petitioner's first assignment of error in its petition for said writ of error was (Rec., p. 4):

> "The defendant cannot be held liable under the Federal Employers' Liability Act, which applies here to the exclusion of any other statute or rule of law, since the intestate's injury and death did not result from the negligence of any of the defendant's officers, agents or employees."

In its petition to rehear the said order of the Supreme Court of Appeals of Virginia entered on January 19th, 1928, affirming the judgment of the Circuit Court of Alleghany County (which judgment was set aside upon said petition), your petitioner again insisted that—

> "Your petitioner shows that under the evidence and the opinion of the Court in this respect Bryant was entitled, as an employee, to a reasonable opportunity to leave the premises, that he was employed in interstate commerce and that the only law applicable to this case is the Federal Employers' Liability Act, under which there can be no recovery except for acts of commission or ommission negligently done.
>
> "And your petitioner submits that it has been

> deprived in this respect of its rights and immunities under said federal statute" (Rec., Petition for Rehearing, p. 181).

and that—

> "The defendant under the pleadings and proof in this case had the right to insist and insists that its relations to the intestate were and are governed exclusively by the Federal Employers' Liability Act and that in imposing liability upon it for the death of said intestate it has been and is deprived of its rights and immunities under said federal statutes" (Rec., Petition for Rehearing, p. 181).

Reasons Relied on for the Allowance of the Writ.

1. This Court has held that "employment includes not only the actual doing of the work but a reasonable margin of time and space necessary to be used in passing to and from the place where the work is to be done" (*Bountiful Brick Co.* v. *Giles,* 276 U. S. 154, 158), and, in the case of an employee in charge of a switch engine, who had left his engine at the place where it was to remain for the night and was leaving the carrier's yard when he was struck by an engine and fatally wounded, where the question was whether under these circumstances the deceased was employed in interstate commerce at the time of his injury, that "in leaving the carrier's yard at the close of his day's work the deceased was but discharging a duty of his employment. See *North Carolina R. Co.* v. *Zachary,* 232 U. S. 248, 260. Like his trip through the yard to

his engine in the morning it was a necessary incident of his day's work * * *."

This incident of the contract of employment—the right to the necessary time for passing from the employer's premises—must be present whenever the completion of his work finds the employee on the master's premises, whether his task is ended because of the close of the day, or because a particular piece of work is finished, or because of his discharge from service.

In the case just cited it was distinctly held (244 U. S. 170, 173) that this necessary incident of the employment partook of the character of the work done during the day of the injury, and since a part of that work was interstate in character it was plain that as the employee passed from his place of work through the carrier's yard he was employed in interstate commerce. In this case, therefore, since the intestate's employment was in interstate commerce when he received the order of dismissal, the relations between your petitioner and the intestate when he was injured before he left its premises were governed by the Federal Employer's Liability Act and the Supreme Court of Appeals of Virginia should have so held.

2. This Court repeatedly has held that a railroad company is not liable to make compensation under the Federal Employers' Liability Act, because of the wilful murder of one of its employees by another employee.

Davis v. *Green*, 260 U. S. 349;

Atlantic Coast Line R. Co. v. *Southwell*, 275 U. S. 64.

3. The Supreme Court of Appeals of Virginia was equally divided in opinion and consequently affirmed, on March 21st, 1929, the judgment of the Circuit Court of Alleghany County. No opinion was handed down with its said judgment and the reasons of the Justices of said Court who were for affirming the judgment of the trial court do not appear.

There is little need to comment upon the opinion of the State Court (Rec., p. 163) handed down with its judgment of affirmance of January 19th, 1928, which judgment was set aside on June 25th, 1928, since certainly one-half of the justices of the court did not concur therein when on March 21st, 1929, the judgment of the trial court was affirmed, without opinion, by an equally divided court.

In the opinion referred to the court held that petitioner's foreman discharged the intestate on the preceding Saturday, not on the Monday of the shooting; that the foreman on Monday as incident to his authority to dismiss, had the implied authority to expel from the master's premises, with reasonable force, an employee who did not leave when dismissed, and that he thus was acting within the scope of his employment in requiring the intestate to leave; and that (Rec., p. 170-171), "when Bryant went to the toolhouse on Monday morning he did not go there as a trespasser. He did not consider the discharge on Saturday as final, and on his way there he said that he expected Dodson would discharge him. * * * Under these circumstances Bryant can not be said to have been a trespasser in going to the toolhouse, but he became such

when informed of his prior dismissal and refused to leave."

The purpose of this reasoning was to avoid the application of the Federal Employers' Liability Act, but obviously even the case stated by the opinion is one within that statute.

If a discharged servant returns to the master's premises, after leaving them upon his discharge, he comes as a trespasser (39 *Corpus Juris*, p. 91, sec. 94); if the intestate's discharge had been complete on the preceding Saturday he must have been a trespasser in returning on Monday. But to regard and treat him as a trespasser, in coming to or being at work upon the carrier's premises on the morning of the shooting, would have forbidden any recovery under the state law, because of the unimpeached, uncontradicted evidence that the foreman had no authority to expel trespassers or to police the tracks (Rec. p. 147)—to the benefit of which evidence the petitioner was entitled under the rule governing a demurrer to the evidence which put the foreman's act outside of the scope of his employment if the foreman was dealing with a trespasser coming upon petitioner's premises. Hence the especial materiality of the finding that the intestate "cannot be said to have been a trespasser in going to the toolhouse" (Rec., p. 171), and that such status continued "until he was informed of his prior dismissal and refused to leave," whereupon he became a trespasser. The court thus necessarily held, notwithstanding the positive declaration that Bryant was discharged on Saturday, that as an incident to the in

testate's employment he had the right to return to the premises on Monday.

Granting, as held in the opinion, that the foreman, with express authority to dismiss the intestate, had the implied authority to require him to leave the premises; that implied authority could not and did not militate against the discharged employee's right, incident to the employment, to the reasonable margin of time necessary to go from the employer's premises in safety. Such implied authority and the employee's right are reciprocal and coextensive. If the implied authority to expel could be exercised, as the opinion holds, upon the foreman informing the intestate of his prior dismissal—it is not to be resurrected from the happenings of two days before—nevertheless the intestate was still entitled to that necessary incident of his employment and was not a trespasser. Thus again the federal question was presented and decided: Whether a carrier's employee engaged in interstate work on its premises becomes a trespasser when informed that he has been discharged, or is he entitled as incident to his employment to the reasonable margin of time necessary to be used in leaving the carrier's premises, during which the federal statute applies. The decision was against the application of the said statute.

The effect of the judgment entered March 21st, 1929, is however, to hold (*a*) that the necessary incident of employment, the right to a reasonable margin of time within which to leave the carrier's premises after the

employee's work there is finished, does not exist if the employee is leaving the work permanently, or (*b*) that such necessary incident of the employment does not partake of the character, interstate or intrastate, as the case may be, of the work just done, or (*c*) that recovery may be had under said federal statute against the carrier for the intestate's injury, wilfully, and not negligently inflicted by another employee.

4. The said state court thus has decided a federal question of substance not theretofore determined by this Court, or has decided it in a way not in accord with applicable decisions of this Court.

It therefore appears that in said cause your petitioner claimed and especially set up a right, privilege or immunity under a statute of the United States, namely, the act entitled "An Act Relating to the Liability of Common Carriers by Railroad to their Employees," approved April 22nd, 1908 (35 Stat. 65, U. S. Code, Ch. 2, sec. 51), and the decision was against such right, privilege or immunity and also in conflict with the decisions of this Court, as will appear from the decisions in the cases cited above, namely:

Bountiful Brick Co. v. *Giles,* 276 U. S. 154, 158;
Erie R. Co. v. *Winfield,* 244 U. S. 170, 173;
Davis v. *Green,* 260 U. S. 349;
Atlantic Coast Line R. Co. v. *Southwell,* 275 U. S. 64.

Your petitioner files herewith as an exhibit hereto a certified copy of the entire transcript of the record

of said case, including the proceedings in the Supreme Court of Appeals of Virginia.

Your petitioner submits that the questions herein involved are of such general interest and importance as to warrant this Court in reviewing them.

Therefore your petitioner respectfully prays that a writ of certiorari may issue, directed to the Supreme Court of Appeals of Virginia, commanding it to certify its record herein to this Court for review and determination by it; that a writ of supersedeas may issue to the judgment aforesaid; that your petitioner may have such other and further relief or remedy in the premises as to this Court may seem appropriate, and that said judgment of the Supreme Court of Appeals of Virginia may be reversed by this honorable Court.

THE CHESAPEAKE & OHIO RAILWAY COMPANY,

By J. M. PERRY,

Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The Opinions of the Courts Below.

No opinion was delivered by the Supreme Court of Appeals of Virginia in entering its judgment March 21st, 1929, affirming the judgment of the Circuit Court of Alleghany County, the Court being equally divided in opinion as to the judgment to be entered in the premises.

That Court delivered an opinion when it entered its first judgment in the cause on January 19th, 1928, afterwards reheard and set aside by its order entered June 25th, 1928, but the opinion referred to was not officially reported, nor printed in any unofficial reporter. It appears at p. 163 of the record accompanying the petition.

II.

Jurisdiction.

1. The date of the judgment to be reviewed is March 21st, 1929 (Rec., p. 188).

2. The specific claims advanced, and rulings made, in the said Supreme Court of Appeals of Virginia, which are relied upon as the basis of this Court's jurisdiction, are:

In its petition for a writ of error to the judgment of the Circuit Court of Alleghany upon which said writ

was awarded the first assignment of error by the Chesapeake & Ohio Railway Company, petitioner, was (Rec., p. 4):

> "The defendant cannot be held liable under the Federal Employers' Liability Act, which applies here to the exclusion of any other statute or rule of law, since the intestate's injury and death did not result from the negligence of any of the defendant's officers, agents or employees."

In its petition to rehear the judgment of January 19th, 1928, which petition was entertained, your petitioner again urged the said assignment of error (Rec., p. 181 and Rec., p. 180), and that

> "Under the evidence and opinion of the Court in this respect Bryant was entitled, as an employee to a reasonable opportunity to leave the premises, that he was employed in interstate commerce, and that the only law applicable to this case is the Federal Employers' Liability Act, under which there can be no recovery except for acts of commission and omission negligently done, and your petitioner submits that it has been deprived in this respect of its rights and immunities under said Federal statute" (Rec., p. 181).

Although the judgment of the trial court was affirmed by the Supreme Court of Appeals of Virginia by a divided court and without opinion, a controlling federal question is necessarily involved, since the petitioner's pleadings refer to and rely upon the Federal Employers' Liability Act to defeat any recovery (Rec.,

pp. 22, 161); its proof was that it was engaged in interstate commerce and that the intestate just before his injury was in interstate employment (Rec., pp. 138, 87-8) and its assignments of error in the state court explicitly set up its immunity under said federal act (Rec., pp. 4, 181). The judgment of the Supreme Court of Appeals of Virginia was against the right, privilege or immunity assured to and so claimed by your petitioner under the federal statute, and was in conflict with the decisions of this Court in the cases just above cited.

The review of this judgment is sought by your petitioner under the provisions of the Judicial Code, sec. 237, as amended by the Act of February 13, 1925, U. S. Code, Sec. 344 (*b*).

The following cases are believed to sustain the jurisdiction of this Court:

Toledo, St. L. & W. R. Co. v. *Slavin,* 236 U. S. 454;

Davis v. *Green,* 260 U. S. 349, 352.

III.

Statement of the Case.

On the Monday morning of the shooting the section force had brought their lever car from petitioner's tool house, had placed it on the main track and were loading their tools on it (Rec., pp. 45-47). The intestate began work, going to the tool house to bring out tools (Rec., pp. 46, 57-58, 103-104). As he went the foreman, Dodson, said, "I ain't going to work you any

more" (Rec., p. 103), or, "Fellow, I don't need you any longer" (Rec., p. 46). The intestate evidently did not hear or did not understand, but went into the tool house, brought out tools and placed them on the lever car (Rec., pp. 46, 103). Dodson then repeated, "I don't need you any longer", to which the intestate replied, "I am due to get my money in six hours after I quit", and, "I will go to see Mr. Long", who was the regular foreman (Rec., pp. 46, 53, 58, 67). Dodson then said, "I have just fooled with you long enough, you get away from here", drew a pistol and aimed it at the intestate (Rec., pp. 46, 53, 58, 67, 104), who said, "What are you going to do with that?" "I am going to make you eat it" (Rec., pp. 46, 53, 68, 104). The intestate did not attempt to attack the foreman, had nothing in his hands, made no effort to draw any weapon and made no advance towards the foreman, but was shot in his tracks (Rec., pp. 48, 58-59, 104-105). Dodson's firing commenced when the intestate said that he would make Dodson eat the pistol (Rec., pp. 46, 53, 55, 68). The whole thing happened very quickly (Rec., pp. 72, 104).

This was on Monday. On the previous Saturday afternoon Bryant threatened to beat Dodson, the latter deposed, and Dodson said, "Remember after this evening I don't work you any more", to which Bryant replied, "If you cause me to lose my job I will kill you" (Rec., p. 88). Another one of the plaintiff's witnesses testified that an hour or more afterwards, at quitting time on Saturday, foreman Dodson said to the intestate, "If you keep on yapping around here

you won't have anything to do'' (Rec., p. 61), and as the intestate went to work on Monday morning he had told a friend that he expected to be dismissed by Dodson that morning (Rec., p. 118-119).

Your petitioner demurred to the evidence in the trial court, insisting upon the application of the Federal Employers' Liability Act and its immunity thereunder (Rec., pp. 159-161). The trial court overruled the demurrer to the evidence and gave judgment in favor of the plaintiff against your petitioner, the defendant, for $8,000, the damages assessed by a jury (Rec., p. 26).

To the said judgment of the Circuit Court of Alleghany County the Supreme Court of Appeals of Virginia awarded a writ of error (Rec., p. 19). On January 19th, 1928, the Court affirmed the judgment of the trial court (Rec., p. 176). Your petitioner filed its petition for a rehearing (Rec., p. 177), which petition was entertained by the Court (Rec., p. 186). On March 28th, 1928, the said Court denied a rehearing (Rec., p. 186), but on the next day, March 29th, 1928, set aside and annulled its said order and judgment denying a rehearing (Rec., p. 186), and on June 25th, 1928, the said Court set aside its judgment of January 19th, 1928, and granted a rehearing (Rec., p. 187). Thereafter, on March 21st, 1929, being equally divided in opinion, a judgment was entered affirming the said judgment of the Circuit Court of Alleghany County, no opinion being delivered (Rec., p. 188).

IV.

Specification of Errors.

1. The Supreme Court of Appeals of Virginia erred in affirming the said judgment and thus in effect holding, (*a*) that the necessary incident of employment, the right to a reasonable margin of time within which to leave the carrier's premises after the employee's work there is finished, does not exist if the employee is leaving the work permanently, or (*b*) that such necessary incident of the employment does not partake of the interstate character of the work being done.

2. The Supreme Court of Appeals of Virginia erred in holding, through its affirmance of the said judgment, that under the pleadings and proof in this case the intestate was not employed in interstate commerce at the time of his injury, and that the petitioner's relations to the intestate were not governed exclusively by the Federal Employers' Liability Act.

3. The Supreme Court of Appeals of Virginia erred in holding, through its affirmance of the said judgment, that under the Federal Employers' Liability Act the intestate may recover damages against your petitioner for the wrongful death of the intestate at the hands of another employee.

V.

ARGUMENT.

The Decision Below Is Contrary to and in Conflict with Prior Federal Decisions.

The State court, in affirming the trial court and thus sanctioning the plaintiff's recovery of damages against your petitioner, necessarily decided that the case was outside of the Federal Employers' Liability Act, either because:

(*a*) The incident of employment, the right to a reasonable margin of time necessary to be used to leave the carrier's premises after the employee's work there is finished, in the opinion of the Court does not exist if the employee is leaving the work permanently; or

(*b*) Such incident of the employment in the opinion of the Court does not partake of the interstate character of the work just done;

Or, in affirming the trial court, the State court was of opinion that recovery may be had under said Federal statute against the carrier for the intestate's injury, wilfully, and not negligently inflicted by another employee.

It is submitted that the view of the State court in either of the alternatives stated was directly in conflict wih the decisions of his Court, as thus appears:

1. The petitioner was a carrier by railroad engaged in interstate commerce (Rec., p. 138); the work to be

done by its section force, including the intestate, on the day of his injury was in the maintenance of petitioner's main line (Rec., pp. 87-88). The employment was interstate in character, although petitioner's employees then were merely preparing to go to the place where the actual task was to be performed, and the Federal Employers' Liability Act applied.

New York Central R. Co. v. *Winfield*, 244 U. S. 147;

New York Central R. Co. v. *Porter*, 249 U. S. 168;

Kinzell v. *C. & St. P. R. Co.*, 250 U. S. 130;

Pedersen v. *D., L. & W. R. Co.*, 229 U. S. 446.

2. After his discharge the petitioner was entitled, as an incident of his employment, to a reasonable margin of time necessary to be used in passing from the petitioner's premises where the work was being done and the discharge effected, during which time the duties of master to servant persisted.

Erie R. Co. v. *Winfield*, 244 U. S. 170, 173;

Bountiful Brick Co. v. *Giles*, 276 U. S. 154, 158.

While the decision of this Court in the case of *Erie* v. *Winfield, supra*, was in the case of an employee who had completed his work, not because he was discharged, but because the day was ended, the principle enunciated cannot be affected by the employee's reason for leaving. It is necessarily applicable where work is not to be resumed, whether because of a discharge while at work, or because the task for which

the laborer is hired is completed, or where the employee expects to return after his night's rest.

The intestate was wounded by petitioner's foreman immediately after being discharged. In fact, the discharge and the shooting were almost simultaneous (Rec., pp. 82, 72). "There wasn't but merely a moment, you might say" (Rec., p. 82). "The whole transaction happened very quickly" (Rec., p. 72).

3. This incident of the employment partook of the character of the work done that day, the making of repairs to and maintaining the interstate carrier's main line, and the intestate's employment necessarily was in interstate commerce. It is plain, therefore, that the intestate was employed in interstate commerce when he was wounded, even though he had received his discharge, and the Federal Employers' Liability Act exclusively applied to and controlled the relations between the intestate and the carrier, your petitioner.

Erie R. Co. v. *Winfield,* 244 U. S. 170, 173.

4. The intestate's injury and death did not result from the negligence of any of the defendant's officers, agents or employees, but from a wilful wrong, and there can be no recovery under the Federal Employers' Liability Act for an injury so inflicted.

Davis v. *Green,* 260 U. S. 349;

Atlantic Coast Line R. Co. v. *Southwell's Admr.,* 275 U. S. 64.

The Court's very hesitation in the case emphasizes the propriety of a review. It first affirmed the judg-

ment of the trial court by the order of January 19th, 1928 (Rec., p. 176). A petition for rehearing was filed and by order entered on March 28th, 1928, it denied a rehearing (Rec., p. 186). On March 29th, 1928, it set aside and annulled the order refusing a rehearing and took further time to consider (Rec., p. 186). On June 25th, 1928, the Court set aside its former judgment of affirmance (Rec., p. 187), and on March 21st, 1929, it affirmed the trial court by a divided court and without opinion (Rec., p. 188).

Conclusion.

It is respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers; and that to such an end a writ of certiorari should be granted and this Court should review the decision of the Supreme Court of Appeals of Virginia and finally reverse it.

Respectfully submitted,

J. M. PERRY,
Counsel for Petitioner.

APPENDIX.

"Whenever the death of a person shall be caused by the wrongful act, neglect, or default of any person or corporation, * * * and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action, or to proceed *in rem* * * * and to recover damages in respect thereof, then and in every such case the person who, or the corporation * * * which, would have been liable, if death had not ensued, shall be liable to an action for damages * * *, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to a felony."

Virginia Code of 1919, Section 5786.

"Every common carrier by railroad engaged in intrastate commerce shall be liable in damages to any of its employees suffering injury while he is employed by such carrier in such commerce, and in case of his death, to his personal representative, for such injury or death, resulting in whole or in part from the wrongful act or neglect of any of the officers, agents, servants or employees of such carrier, or by reason of any defect or insufficiency, due to its neglect, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment. If the action be for the death of an employee, sections 5787, 5788, 5789 and 5790 shall apply thereto as far as applicable. No action shall be maintained under this section, unless it be commenced within one year from the day the cause of action accrued.

Virginia Code 1919, Section 5791.

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CHARLES ELMOR

Supreme Court of the United States

OCTOBER TERM, 1929

No. 113

THE CHESAPEAKE & OHIO RAILWAY COMPANY, Petitioner,

v.

R. L. BRYANT, Administrator of M. L. Bryant, Deceased, Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

Brief for the Chesapeake & Ohio Railway Company, Opposing Respondent's Motion to Dismiss

J. M. PERRY,
For the Petitioner,
Staunton, Virginia.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 113

THE CHESAPEAKE & OHIO RAILWAY COMPANY, Petitioner,

v.

R. L. BRYANT, Administrator of M. L. Bryant, Dec'd, Respondent.

On Writ of Certiorari to the Supreme Court of Appeals of Virginia.

BRIEF FOR PETITIONER, UPON RESPONDENT'S MOTION TO DISMISS

I.

THE OPINIONS OF THE COURTS BELOW

No opinion was delivered by the Supreme Court of Appeals of Virginia in entering its judgment here under review on March 21, 1929, affirming, by a divided court, the judgment of the Circuit Court of Alleghany County.

The Supreme Court of Appeals of Virginia delivered an opinion when it entered a first judgment in the cause January 19, 1928, which judgment it afterwards reheard and set aside by its order entered June 25, 1928 (Rec., p. 187). The opinion re-

ferred to was not officially reported, nor has it been printed in any unofficial reporter. It appears at p. 163 of the record here.

II.

THE JURISDICTION OF THIS COURT

1. The date of the judgment to be reviewed is March 21, 1929 (Rec., p. 183), affirming, by a court equally divided in opinion, a judgment of the Circuit Court of the County of Alleghany, Virginia, in favor of the respondent, plaintiff below, against the petitioner for $8,000 damages (Rec., p. 26).

2. The specific claims advanced, and rulings made, in the said Supreme Court of Appeals of Virginia, which are relied upon as the basis of this Court's jurisdiction, are:

In its petition for a writ of error to the judgment of the Circuit Court of Alleghany upon which said writ was awarded, the first assignment of error by The Chesapeake & Ohio Railway Company, petitioner, was (Rec., p. 4):

"The defendant cannot be held liable under the Federal Employers' Liability Act, which applies here to the exclusion of any other statute or rule of law, since the intestate's injury and death did not result from the negligence of any of the defendant's officers, agents, or employees."

In its petition for a rehearing, upon which the judgment of January 19, 1928, was set aside, your

petitioner again urged the said assignment of error (Rec., pp. 181, 180), and that

"Under the evidence and opinion of the Court in this respect Bryant was entitled, as an employee, to a reasonable opportunity to leave the premises, that he was employed in interstate commerce, and that the only law applicable to this case is the Federal Employers' Liability Act, under which there can be no recovery except for acts of commission and omission negligently done, and your petitioner submits that it has been deprived in this respect of its rights and immunities under said Federal statute."

Although the judgment of the trial court was affirmed by the Supreme Court of Appeals of Virginia by a divided court and without opinion, a controlling Federal question is necessarily involved, since the petitioner's pleadings refer to and rely upon the Federal Employers' Liability Act to defeat any recovery (Rec., pp. 22, 161); the proof was that it was engaged in interstate commerce and that the work being done by the intestate just before his injury was interstate in character (Rec., pp. 138, 87-88) and its assignments of error in the state court explicitly set up its immunity under said Federal act (Rec., pp. 4, 181). The judgment of the Supreme Court of Appeals of Virginia was against the right, privilege or immunity assured to and so claimed by your petitioner under the Federal statute, and was in conflict, it is believed, with the decisions of this Court in the following cases.

Bountiful Brick Co. v. Giles, 276 U. S. 154, 158;

Erie R. Co. v. Winfield, 244 U. S. 170, 173;

Davis v. Green, 260 U. S. 349;

Atlantic Coast Line R. Co. v. Southwell, 275 U. S. 64.

3. The petitioner, The Chesapeake & Ohio Railway Company, filed its petition for a writ of certiorari under the provisions of sec. 237 of the Judicial Code as amended by the Act of February 13, 1925, United States Code, sec. 334(b), and said petition was granted by this Court June 3, 1929.

4. The following cases are believed to sustain the jurisdiction of this Court:

Toledo St. L. & W. R. Co. v. Slavin, 236 U. S. 454;

St. Louis I. M. & S. R. Co. v. McWhirter, 299 U. S. 265;

Kansas City S. R. Co. v. C. H. Albers Commission Co., 223 U. S. 573;

Johnson v. Risk, 137 U. S. 300.

North Carolina R. R. Co. v. Zachary, 232 U. S. 248;

Davis v. Green, 260 U. S. 349, 352;

III.

ASSIGNMENTS OF ERROR

In its brief accompanying its petition for certiorari petitioner made the following assignments of error:

1. The Supreme Court of Appeals of Virginia erred in affirming the said judgment and thus in effect holding, (a) that the necessary incident of employment, the right to a reasonable margin of time within which to leave the carrier's premises after the employee's work there is finished, does not exist if the employee is leaving the work permanently, or (b) that such necessary incident of the employment does not partake of the interstate character of the work being done.

2. The Supreme Court of Appeals of Virginia erred in holding, through its affirmance of the said judgment, that under the pleadings and proof in this case the intestate was not employed in interstate commerce at the time of his injury, and that the petitioner's relations to the intestate were not governed exclusively by the Federal Employers' Liability Act.

3. The Supreme Court of Appeals of Virginia erred in holding, through its affirmance of the said judgment, that under the Federal Employers' Liability Act the intestate may recover damages against your petitioner for the wrongful death of the intestate at the hands of another employee.

IV.

THE QUESTION HERE

The petitioner opposes respondent's motion to dismiss the writ of certiorari heretofore granted, the ground stated in the motion being (Respond-

ent's Motion, p. 3) that the jurisdiction of the Court depends upon a question of fact, which respondent claims was passed upon and settled by the state court against petitioner, namely, whether or not the respondent's intestate, M. L. Bryant, was employed by the petitioner in interstate commerce when he was fatally injured.

STATEMENT OF THE CASE

In view of the ground of the motion to dismiss it is necessary to set forth in some detail the proceedings in the state courts, and, briefly, the material facts.

(1) Proceedings in the State Court:

The suit was to recover damages for the alleged wrongful death of respondent's intestate, M. L. Bryant, brought under the Virginia statutes which permit recovery for death caused by wrongful act as well as by negligence (Code of Virginia, 1919, secs. 5791, 5786—see Appendix), the declaration specifically averring that the deceased was about his work as petitioner's servant when petitioner's foreman discharged him, and that when the deceased did not leave the premises immediately the foreman shot him (Rec., pp. 19-21). The petitioner pleaded generally (Rec., p. 21) and filed a special plea that it was a common carrier by railroad engaged in interstate commerce, that the intestate was employed by it in such commerce, and that his death did not result from the negligence of any of its officers, agents, or employees. The respondent

filed a replication (Rec., p. 25) denying that the intestate was in petitioner's employment when injured and that he was employed in interstate commerce.

At the trial the petitioner demurred to the evidence, and, as required by statute (Code of Virginia, 1919, sec. 6117—see Appendix), stated in writing specifically the grounds relied on, and therein petitioner especially insisted that it was engaged and the intestate employed in interstate commerce at the time of the intestate's injury, that his injury did not result in whole or in part from negligence and that no cause of action had accrued to the plaintiff under the statute governing such employment and engagement in interstate commerce (Rec., p. 161). The trial court overruled petitioner's demurrer to the evidence and gave judgment against it. The petitioner excepted (Rec., p. 26).

Under the Virginia practice the effect of a demurrer to the evidence is: "The party demurring is considered as admitting the truth of the adversary's evidence, and all just inferences which can be properly drawn therefrom by a jury, and as waiving all of his own evidence which conflicts with that of his adversary, and all inferences from his own evidence (although not in conflict with his adversary's) which do not necessarily result therefrom." Johnson v. C. & O. Ry. Co., 91 Va. 171, 174; A. C. L. R. Co. v. Wheeler, 147 Va. 1, 17. The Court, however, is not obliged to accept as true what it knows judicially to be untrue. N. & W.

R. Co. v. Strickler, 118 Va. 153, 155. And a demurrer to the evidence does not waive an objection to illegal or incompetent evidence, admitted over the demurrant's motion to exclude. N. & W. R. Co. v. Warden, 117 Va. 801, 804.

The Supreme Court of Appeals of Virginia upon writ of error first affirmed the judgment by order entered on January 19, 1928 (Rec., p. 176), delivering an opinion (Rec., p. 163), but afterwards on June 25, 1928, reheard and set aside its judgment (Rec., p. 187), and on March 21, 1929, said Supreme Court of Appeals of Virginia, being equally divided in opinion, affirmed the judgment of the Circuit Court of Alleghany County (Rec., p. 188), delivering no opinion.

(2) Summary statement of facts:

Bryant, the deceased, was a section laborer, employed for some years by petitioner, an interstate carrier by railroad (Rec., pp. 88, 138). While the deceased was doing work of interstate character on petitioner's premises on Monday, August 31, your petitioner's acting foreman Dodson told him he did not need him any longer (Rec., pp. 46, 53, 72, 103), but the deceased did not hear the foreman and went on with his work (Rec., pp. 146, 103). The foreman repeated his words of dismissal, with emphasis, and immediately thereafter, before Bryant had moved from the place he stood, Dodson shot and fatally wounded him (Rec., 46, 53, 57, 67, 104). The whole affair happened very quickly (Rec., pp. 72, 104).

There had been some difficulty between the intestate and the foreman on the preceding Saturday while the section force was engaged in like work. The intestate then had threatened to beat the foreman; the foreman had said, "After this evening remember I don't work you any more," and the intestate had replied, "If you cause me to lose my job I will kill you" (Rec., p. 88). Afterwards on the same day, at quitting time, Foreman Dodson threatened to discharge Bryant, saying to him, "If you keep on yapping around here you won't have anything to do" (Rec., p. 61).

Dodson testified that he discharged Bryant on Saturday (Rec., p. 85) but this was solely the witness' conclusion from the facts above set out, was objected to by the petitioner on this ground, the objection was overruled, and exception was taken.

The foreman had no authority to expel trespassers or to police petitioner's tracks (Rec., p. 147).

ARGUMENT

Summary of the Argument

Point I—The State court did not make any finding of facts as claimed by the respondent in his motion to dismiss.

Point II—This Court has complete jurisdiction to review and dispose of this action upon its own findings of fact and law.

Point III—The ground upon which respondent asserts that the judgment of the state court was

based is in substance and effect the decision of a Federal question, and the denial of the Federal right claimed by petitioner; otherwise there was no good and valid ground, sufficient of itself to sustain the judgment.

Point IV—The petitioner has not admitted, as claimed by respondent, that the intestate was not in its employment when the shooting occurred.

Point I.

The State court did not make any finding of facts, as claimed by the respondent in his motion to dismiss.

The judgment of March 21, 1929 (Rec., p. 188), was the affirmance of the judgment of the trial court by an equally divided court. No opinion was delivered and no facts were found.

The judgment of the Circuit Court of Alleghany County (Rec., p. 26) was general, overruling the demurrer to the evidence and for the damages assessed by the jury. There was no finding of facts whatever.

The repeated references in the respondent's brief to the opinion of the Supreme Court of Appeals of Virginia are to the opinion delivered with the first judgment of the State Court (Rec., p. 176), afterwards reheard and set aside (Rec., p. 187)—a nullity. The opinion of Judge Burks delivered with that judgment (Rec., p. 163) fell with the judgment and is not a finding of facts supporting the judgment here under review.

Point II.

This Court has complete jurisdiction to review and dispose of this action upon its own findings of fact and law.

The jurisdiction of the Court herein is based upon the fact that the judgment of the State court denied petitioner, an interstate carrier, a right and immunity especially claimed by it under the Federal Employers' Liability Act, the right to be shielded from liability for damages for an injury sustained by its interstate employee, not occasioned by the negligence of itself, its officers, agents, or employees.

In the case of North Carolina R. R. Co. v. Zachary, 232 U. S. 248, the State court had held that the deceased at the time he was killed was not in fact employed in interstate commerce, and it was insisted here that there was no evidence tending to show that he was engaged in such commerce. This Court said of that contention (p. 258):

> "But it is now insisted that there was no evidence tending to show that deceased was engaged in interstate commerce. This renders it incumbent upon us to analyze the evidence to the extent necessary to give to plaintiff in error the benefit of its asserted Federal rights, Southern Pacific Co. v. Schuyler, 227 U. S. 601, 611, and cases cited."

In Kansas City Southern R. Co., v. C. H. Albers Commission Co., 223 U. S. 573, 591, it was said:

> "While it is true that upon a writ of error to a state court we cannot review its decision upon pure questions of fact, but only upon questions of law bearing upon the Federal rights set up by the unsuccessful party, it equally is true that we may examine the entire record, including the evidence, if properly incorporated therein, to determine whether what purports to be a finding upon questions of fact is so involved with and dependent upon such questions of law as to be in substance and effect a decision of the latter."

Again, in St. Louis I. M. & R. Co. v. McWhirter, 229 U. S. 265, 277, it was said:

> "While it is true, as we have said, that, coming from a state court, the power to review is controlled by Rev. Stat., sec. 709, yet where, in a controversy of a purely Federal character, the claim is made and denied that there was no evidence tending to show liability under the Federal law, such ruling, when duly excepted to, is reviewable, because inherently involving the operation and effect of the Federal law. Kansas City Southern R. Co. v. C. H. Albers Commission Co., 223 U. S. 573, 591; Creswill v. Grand Lodge, K. P., 225 U. S. 246."

The respondent's declaration sought a recovery upon the specific averment that the relation of

master and servant existed on the day of the shooting and that the deceased was then doing the work he was employed to do (Rec., p. 19).

It appeared from the evidence at the trial, without contradiction, that petitioner was an interstate carrier by railroad (Rec., 88, 138) and that the deceased was actually doing work of interstate character on petitioner's premises on the day of the shooting when petitioner's acting foreman told him that he had no more work for him to do (Rec., pp. 46, 53, 73, 103); that the deceased did not hear the foreman and continued to work (Rec., pp. 146, 103); and that the foreman then repeated the dismissal and immediately thereafter shot and fatally wounded the deceased (Rec., pp. 46, 53, 57, 67, 104).

Clearly a Federal question was passed upon and decided by the State court in permitting a recovery regardless of these circumstances which compel the application of the Federal statute.

Point III.

The ground upon which respondent asserts that the judgment of the state court was based, is in substance and effect the decision of the Federal right claimed by petitioner; otherwise there was no good and valid ground sufficient of itself to sustain the judgment.

The only opinion in this case was that of Judge Burks, handed down January 19, 1928, in support of the judgment afterwards reheard and set aside. Certainly one half of the justices of the Court did

not adhere thereto when on March 21, 1929, the judgment of the trial court was affirmed by the court equally divided in opinion. But the respondent in his brief in support of his motion to dismiss repeatedly refers to that opinion and seeks to infer from it the existence of some valid non-Federal ground upon which the subsequent affirmance of the trial court might have been based.

In that opinion it is said that petitioner's foreman discharged the intestate on the preceding Saturday, that the foreman two days afterwards on Monday, as incident to his authority to dismiss, had the implied authority to expel from the master's premises, with reasonable force, an employee who did not leave when dismissed, and when on Monday he informed deceased that he had been discharged, he thus was acting within the scope of his employment in requiring the intestate to leave the premises. But the opinion further held (Rec., pp. 170-171) that "when Bryant went to the tool house on Monday morning he did not go there as a trespasser. He did not consider the discharge on Saturday as final, and on his way there he said that he expected that Dodson would discharge him. . . . **Under these circumstances Bryant cannot be said to have been a trespasser in coming to the tool house, but he became such when informed of his prior dismissal and refused to leave."** (Italics supplied.)

The purpose of this reasoning was to avoid the application of the Federal Employers' Liability Act, but obviously even the case stated by the

opinion is within that statute. The opinion necessarily held that as an incident of the intestate's employment he had the right to return as an employee to the premises on Monday.

If a discharged servant returns to the master's premises, after leaving them upon his discharge, he comes as a trespasser (39 Corpus Juris, p. 91, sec. 94). On the preceding Saturday the deceased left the petitioner's premises when his work was done. If his discharge had been complete on that day he must have been a trespasser in returning on Monday. Yet to regard him as a trespasser, in coming to or being at work upon the carrier's premises on the morning of the shooting, would have forbidden any recovery under the state law, because of the unimpeached, uncontradicted evidence that the foreman had no authority to expel trespassers or to police the tracks (Rec., p. 147)—to the benefit of which evidence the petitioner was entitled under the rule governing a demurrer to the evidence (Johnson v. C. & O. Ry. Co., 91 Va. 171, 174, supra)—which evidence put the foreman's act outside of the scope of his employment, if he was dealing with a trespasser coming upon petitioner's premises. His only authority, as foreman, had been fully exercised two days before, and could not again be exercised except as to an employee. Hence the especial materiality of the finding that the intestate "cannot be said to have been a trespasser" in coming to and being at work (Rec., p. 171) and that he was not a trespasser "until he was informed of his

prior dismissal and refused to leave," whereupon he became a trespasser.

Assuming, as held in this opinion, that the foreman, with express authority to dismiss the deceased, had the implied authority to require him to leave the premises upon informing him of his discharge, the exercise of such implied authority could not and did not deprive the discharged employee of his right, incident to the employment, to the reasonable margin of time necessary to leave the employer's premises in safety. The foreman's implied authority and the employee's right are reciprocal and co-extensive. If, as the opinion holds, the foreman could exercise the implied authority to expel as incident to his informing the intestate that he had been dismissed, nevertheless the intestate was still entitled to that necessary incident of his employment, and his relation to his employer was still controlled by the Federal act.

Thus, again, the Federal question was presented and decided: Whether a carrier's employee doing interstate work on its premises becomes a trespasser when informed that he has been discharged, or is he entitled as incident to his employment to the reasonable margin of time necessary to be used in leaving the carrier's premises, during which the Federal statute applies. This opinion held that the deceased became a trespasser immediately upon being informed of his discharge; and was against the application of the Federal statute.

It is said in the case of Johnson v. Risk, 137 U. S. 300, 307:

> "Where there is a Federal question, but the case may have been disposed of on some other independent ground, and it does not appear on which of the two grounds the judgment was based, then if the independent ground was not a good and valid one, sufficient of itself to sustain the judgment, this court will take jurisdiction of the case, because, when put to inference as to what points the state court when decided, we ought not to assume that it proceeded on ground clearly untenable."

If, as contended by respondent, the deceased was completely discharged on Saturday, two days before the Monday of the shooting, as and after he left petitioner's premises on Saturday he was a stranger, with whom the petitioner had no contractual relation whatever. When he came upon petitioner's premises two days later and was shot, he came as a stranger and a trespasser.

It is elementary that to impose liability upon the master for its servant's assault upon such stranger, the servant's act must be shown to have been within the scope of his employment. Where, as here is proved to be the case, the servant had no authority to police the tracks or to expel trespassers, his assault upon the deceased, a stranger and under the law a trespasser, was clearly beyond the

scope of his employment, a tort for which the petitioner could not be held liable.

The statement of respondent's brief (p. 7) that the plaintiff "assumed when he brought his suit that Bryant was not an employee of the defendant when the mischief happened," if intended to imply that the deceased was not an employee on the morning of the shooting, is best answered by reference to the express averments of his declaration (Rec., pp. 19-20) that the deceased, as the petitioner's servant, had begun his day's work where he was employed to work, and was doing what he was employed to do, when the petitioner's foreman directed him to stop work and to leave the employment and when he did not leave the premises immediately, shot him.

These circumstances do not afford a good and valid ground, independent of the Federal question involved in the case, sufficient of itself to sustain the judgment.

Point IV.

The petitioner has not admitted, as claimed by respondent, that the intestate was not in its employment when the shooting occurred.

At p. 13 of the respondent's brief in support of his motion, it is said that "the defendant admitted in its demurrer to the evidence that Bryant was not in its employment when the shooting occurred. It is very true that this admission was made in defendant's grounds of demurrer to the evidence, but

grounds of demurrer to the evidence are part of the demurrer itself."

Under the Virginia statute (Code of Virginia, 1919, sec. 6107—see Appendix) "the defendant in any action may plead as many several matters, whether of law or fact, as he shall think necessary." . . . Not only are inconsistent pleas permitted and without prejudice to the defendant, but in trying one plea the Court cannot look to the existence of the other (Norfolk Hosiery, Etc., Co. v. Ætna Hosiery Co., 124 Va. 221, 234).

The Virginia statute (Code of Virginia, 1919, sec. 6117—see Appendix) provides that a party tendering a demurrer to the evidence shall "state in writing specifically the grounds of demurrer relied on and the demurree shall not be compelled to join in said demurrer until such grounds have been so stated"—provisions similar to the statutory requirement (Virginia Code, 1919, sec. 6115) that the party demurring to a pleading may be required to state specifically the grounds of demurrer relied upon.

The demurrant must specify every ground upon which he may rely in support of his demurrer to the evidence, and the Court will not consider any ground not thus pointed out (Davis v. Ellis' Admx., 146 Va. 366, 382, and cases cited). The object of the statute was to require the demurrant to give notice in writing of the grounds of demurrer or causes of demurrer which he intends to rely on, and to prevent him from assigning grounds of demurrer in the appellate court wholly different from

those relied on in the trial court (McMenamin v. Southern R. Co., 115 Va. 822, 824). Even assuming that the respondent is correct in his contention that the grounds stated in connection with a demurrer to the evidence are a pleading, the statutory provision that a defendant may plead as many several matters, whether of law or fact, as he shall think necessary, expressly permits stating inconsistent or repugnant grounds and precludes treating the statement of one ground as a waiver of another.

The petitioner has made no such admission.

CONCLUSION

This Court has complete jurisdiction to review and dispose of this action, for the judgment of the State court necessarily involved and disposed of adversely to petitioner the Federal right it claimed.

Respectfully submitted,

J. M. PERRY,
Counsel for Petitioner,
Staunton, Virginia.

APPENDIX

Virginia Code, 1919, sec. 5791, concerning liability of railroads to employees:

"Every common carrier by railroad engaged in intrastate commerce shall be liable in damages to any of its employees suffering injury while he is employed by such carrier in such commerce, and in case of his death, to his personal representative, for such injury or death, resulting in whole or in part from the wrongful act or neglect of any of the officers, agents, servants, or employees of such carrier, or by reason of any defect or insufficiency, due to its neglect, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment. If the action be for the death of an employee, sections 5787, 5788, 5789, and 5790 shall apply thereto as far as applicable. No action shall be maintained under this section, unless it is commenced within one year from the day the cause of action accrued."

Extract from Virginia Code, 1919, sec. 5786, concerning damages for death by wrongful act:

"Whenever the death of a person shall be caused by the wrongful act, neglect, or default of any person or corporation, . . . and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action, or to proceed **in rem** . . . and to recover damages in respect thereof, then and in every such case the person who, or the corporation . . . which,

would have been liable, if death had not ensued, shall be liable to an action for damages . . . , notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to a felony."

Virginia Code, 1919, sec. 6117, concerning demurrer to evidence; grounds to be stated.

"The party tendering a demurrer to the evidence shall state in writing specifically the grounds of demurrer relied on, and the demurree shall not be compelled to join in said demurrer until such grounds have been so stated, nor shall any ground of demurrer not thus specifically stated be considered; but the court shall allow the demurree to withdraw his joinder in such demurrer and introduce new evidence, or suffer a non-suit, at any time before the jury retire from the bar. The demurrant shall also be permittted to withdraw his demurrer within the same time."

Virginia Code, 1919, sec. 6107, permitting defendant to plead several matters:

"The defendant in any action may plead as many several matters, whether of law or fact, as he shall think necessary, and he may file pleas in bar at the same time with pleas in abatement, or within a reasonable time thereafter, but the issues on the pleas in abatement shall be first tried, and if such issues be found against the defendant, he may,

nevertheless, make any other defenses he may have to the action. Special pleas constituting a good defense shall not be rejected because provable under the general issue."

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CHARLES ELMORE
CL

Supreme Court of the United States

OCTOBER TERM, 1929

No. 113

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, Petitioner,

v.

R. L. BRYANT, Administrator of M. L. Bryant, Deceased, Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA.

Brief for the Chesapeake and Ohio Railway Company, Petitioner.

J. M. PERRY,
For the Petitioner.
Staunton, Virginia.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 113

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, Petitioner,

v.

R. L. BRYANT, Administrator of M. L. Bryant, Deceased, Respondent.

On Writ of Certiorari to the Supreme Court of Appeals of Virginia.

BRIEF FOR PETITIONER.

I.

The Opinions of the Courts Below.

No opinion was delivered by the Supreme Court of Appeals of Virginia in entering its judgment here under review on March 21, 1929, affirming, by a divided court, the judgment of the Circuit Court of Alleghany County.

That Court delivered an opinion with a judgment in the case entered January 19, 1928, but it afterwards reheard and set aside the judgment by order entered June 25, 1928 (Rec., p. 187). The opinion referred to was not officially reported or printed in any unofficial reporter. It appears at p. 163 of the record here.

II.

The Jurisdiction of This Court.

1. The date of the judgment to be reviewed is March 21, 1929 (Rec., p. 183), affirming, by a court equally divided in opinion, a judgment of the Circuit Court of the County of Alleghany, Virginia, in favor of the respondent, plaintiff below, against the petitioner for $8,000. damages (Rec., p. 26).

2. The specific claims advanced, and rulings made, in the said Supreme Court of Appeals of Virginia, which are relied upon as the basis of this Court's jurisdiction, are:

In its petition to the Supreme Court of Appeals of Virginia upon which a writ of error to the judgment of the Circuit Court of Alleghany was awarded, petitioner's first assignment of error was (Rec., p. 4):

> "The defendant cannot be held liable under the Federal Employers' Liability Act, which applies here to the exclusion of any other statute or rule of law, since the

> intestate's injury and death did not result from the negligence of any of the defendant's officers, agents or employees."

In its petition for a rehearing, upon which the judgment of January 19, 1928, was set aside, your petitioner again urged the said assignment of error (Rec., pp. 181, 180), and that:

> "Under the evidence and opinion of the Court in this respect Bryant was entitled, as an employee, to a reasonable opportunity to leave the premises, that he was employed in interestate commerce, and that the only law applicable to this case is the Federal Employers' Liability Act, under which there can be no recovery except for acts of commission and omission negligently done, and your petitioner submits that it has been deprived in this respect of its rights and immunities under said Federal statute."

Although the judgment of the trial court was affirmed by the Supreme Court of Appeals of Virginia by a divided court and without opinion, a controlling Federal question is necessarily involved, since the petitioner's pleadings refer to and rely upon the Federal Employers' Liability Act to defeat any recovery (Rec., pp. 22, 161); the proof was that it was engaged in interstate commerce and that the work being done by the intestate just

before his injury was interstate in character (Rec., pp. 138, 87-88) and its assignments of error in the state court explicitly set up its immunity under said Federal act (Rec., pp. 4, 181).

The judgment of the Supreme Court of Appeals of Virginia was against the right, privilege or immunity under the Federal statute assured to and so claimed by your petitioner, and was in conflict, it is believed, with the decisions of this Court in the following cases:

Bountiful Brick Co. v. Giles, 276 U. S. 154, 158;

Erie R. Co. v. Winfield, 244 U. S. 170, 173;

Davis v. Green, 260 U. S. 349;

Atlantic Coast Line R. Co. v. Southwell, 275 U. S. 64.

3. The Chesapeake and Ohio Railway Company filed its petition for a writ of certiorari under the provisions of sec. 237 of the Judicial Code as amended by the Act of February 13, 1925, United States Code, sec. 344 (b), and said petition was granted by this Court June 3, 1929.

4. The following cases are believed to sustain the jurisdiction of this Court:

Toledo St. L. & W. R. Co. v. Slavin, 236, U. S. 454;

St. Louis I. M. & S. R. Co. v. McWhirter, 229 U. S. 265;

Kansas City S. R. Co. v. C. H. Albers Commission Co., 223 U. S. 573;

Johnson v. Risk, 137 U. S. 300;

North Carolina R. Co. v. Zachary, 232 U. S. 248;

Davis v. Green, 260 U. S. 349, 352;

Atlantic Coast Line R. Co. v. Southwell's Admr., 275 U. S. 64.

5. The matter of jurisdiction is argued at length in a brief filed by the petitioner opposing the respondent's motion to dismiss for alleged want of jurisdiction, submitted by respondent November 25, 1929, and it is respectfully requested that the argument there submitted by petitioner may be considered here as if fully set forth.

III.

Statement of the Case.

(a) Proceedings in the State Court:

M. L. Bryant's administrator instituted suit against the petitioner in the Circuit Court of Alleghany County, Virginia, for damages for the death of said M. L. Bryant, dec'd, under the Virginia statutes governing liability of railroads to employees and death by wrongful act, which statutes permit a recovery for death caused by wrongful act as well as by negligence (Virginia Code, 1919, secs. 5791, 5786), averring in his declaration that the deceased

was employed by the Railway Company, that when he began his day's work where he was employed to work the petitioner's foreman directed him to stop work and to leave the employment and that when the deceased "did not after he was discharged leave the premises immediately" the foreman shot him (Rec., p. 19). The petitioner by appropriate pleading set up as a defence that it was a common carrier by railroad engaged in interstate commerce, that the plaintiff's intestate was employed in such commerce at the time of the commission of the supposed grievance and that the intestate's injury did not result in whole or in part from the negligence of the petitioner's officers, agents or employees (Rec., pp. 22, 25). Thus the suit became one governed exclusively by the Federal Employers' Liability Act (35 Stat. 65, U. S. Code, ch. 2, sec. 51), of the facts so pleaded were proved.

At the trial of the case it appeared without question that the petitioner was such interstate carrier engaged in interstate commerce and that the deceased immediaely before his injury was doing work of interstate character (Rec., pp. 138, 46, 47, 87-88).

Petitioner demurred to the evidence, especially insisting in its statement of the grounds of its demurrer that petitioner was engaged and the deceased employed in interstate commerce at the time of the deceased's injury, that said injury did not result in whole or in part from negligence and that no cause of action against petitioner had accrued to the plaintiff under the statute governing such

employment and engagement in interstate commerce (Rec., p. 161). The trial court overruled the demurrer to the evidence and gave judgment against the petitioner for $8,000., the damages assessed by a jury, its decision thus being against the right, privilege or immunity under said Federal statute specifically claimed by the petitioner.

Under the Virginia practice the effect of a demurrer to the evidence is: "The party demurring is considered as admitting the truth of the adversary's evidence, and all just inferences which can be properly drawn therefrom by a jury, and as waiving all of his own evidence which conflicts with that of his adversary, and all inferences from his own evidence (although not in conflict with his adversary's) which do not necessarily result therefrom." Johnson v. C. & O. Ry. Co., 91 Va. 171, 174; A. C. L. R. Co. v. Wheeler, 147 Va. 1, 17. The Court, however, is not obliged to accept as true what it knows judicially to be untrue. N. & W. R. Co. v. Strickler, 118 Va. 153, 155. Nor does the demurrant admit any forced or illogical deductions from the testimony. Hicks v. Romaine, 116 Va. 401, 411. And a demurrer to the evidence does not waive an objection to illegal or incompetent evidence, admitted over the demurrant's motion to exclude. N. & W. R. Co. v. Warden, 117 Va. 801, 804.

The Supreme Court of Appeals of Virginia awarded a writ of error to the judgment. On January 19, 1928, that Court affirmed the judgment of the trial court (Rec., p. 176), delivering an opinion

(Rec., p. 163). By order entered on June 25, 1928, the Court reheard and set aside its said judgment of affirmance (Rec., p. 187).

On March 21, 1929, the Supreme Court of Appeals of Virginia being "equally divided in opinion as to the judgment to be entered in the premises" (Rec., p. 188), affirmed the judgment of the Circuit Court of Alleghany County, but delivered no opinion.

(b) Summary Statement of Facts:

The deceased had been employed by petitioner for several years as a section laborer. Dodson, who shot him, was a section laborer working in the same force, who was temporarily acting as foreman in the place of Long, petitioner's regular foreman, who had been called away and with the consent of his superior had placed Dodson in charge of the work then being done and the force of hands then doing it (Rec., p. 145). The duties of a section foreman were to maintain the track and right of way (Rec., p. 141) and he had no authority to police or guard the railroad tracks against trespassers (Rec., p. 147). The work being done was changing the tracks of the main line, putting in new ties and surfacing (Rec., p. 145) and that to be done on the day of the shooting was laying rails (Rec., p. 88).

On the Monday morning of the shooting the section force had brought their lever car from petitioner's tool house, had placed it on the main track and were loading their tools on it (Rec., pp. 45-47).

The intestate began work, going to the tool house to bring out tools (Rec., pp. 57-58, 103-104). As he went the foreman, Dodson, said, "I ain't going to work you any more" (Rec., p. 103), or, "Fellow, I don't need you any longer" (Rec., p. 46). The intestate evidently did not hear or did not understand, but went into the tool house, brought out tools and placed them on the lever car (Rec., pp. 46, 103). Dodson then repeated, "I don't need you any longer," to which the intestate replied, "I am due to get my money in six hours after I quit," and, "I will go to see Mr. Long," who was the regular foreman (Rec., pp. 46, 53, 58, 67). Dodson then said, "I have just fooled with you long enough, you get away from here," drew a pistol and aimed it at the intestate (Rec., pp. 46, 53, 58, 67, 104), who said, "What are you going to do with that?" "I am going to make you eat it" (Rec., pp. 46, 53, 68, 104). The intestate did not attempt to attack the foreman, had nothing in his hands, made no effort to draw any weapon and made no advance towards the foreman, but was shot in his tracks (Rec., pp. 48, 58-59, 104-105). Dodson's firing commenced when the intestate said that he would make Dodson eat the pistol (Rec., pp. 46, 53, 55, 68). The whole thing happened very quickly (Rec., pp. 72, 104).

This was on Monday. On the previous Saturday afternoon Bryant threatened to beat Dodson, the latter deposed, and Dodson said, "Remember after this evening I don't work you any more," to which Bryant replied, "If you cause me to lose my job I will kill you" (Rec., p. 82). An hour or more

afterwards at quitting time on Saturday Foreman Dodson said to the intestate, "If you keep on yapping around here you won't have anything to do" (Rec., p. 61). As the deceased went to work on Monday morning he told a friend that he expected to be dismissed by Dodson that morning (Rec., pp. 118-119). In the same deposition Dodson testified that he discharged Bryant on Saturday (Rec., p. 85), but this was only the witness' conclusion from the facts above set out, was objected to by petitioner on this ground, the objection was overruled and exception was taken.

IV.

Specification of Errors.

1. The Supreme Court of Appeals of Virginia erred in affirming the said judgment and thus in effect holding, (a) that the necessary incident of employment, the right to a reasonable margin of time within which to leave the carrier's premises after the employee's work there is finished, does not exist if the employee is leaving the work permanently, or (b) that such necessary incident of the employment does not partake of the interstate character of the work being done.

2. The Supreme Court of Appeals of Virginia erred in holding, through its affirmance of the said judgment, that under the pleadings and proof in this case the intestate was not employed in interstate commerce at the time of his injury, and that

the petitioner's relations to the intestate were not governed exclusively by the Federal Employers' Liability Act.

3. The Supreme Court of Appeals of Virginia erred in holding, through its affirmance of the said judgment, that under the Federal Employers' Liability Act the respondent may recover damages against your petitioner for the wrongful death of the intestate at the hands of another employee.

V.

SUMMARY OF THE ARGUMENT.

Point (a) Although petitioner's employees were merely loading tools upon a lever car presently to be taken to and used in work upon the main line of an interstate carrier ,this was employment interstate in character, although the actual work of laying rails had not begun.

Point (b) A carrier's employee, upon his dismissal while at work, is entitled to a reasonable margin of time necessary to be used in passing from the carrier's premises where his work is being done, during which the duties of master to servant persist.

Point (c) Such incident of the employment partakes of the interstate character of the work then being done, and the Federal Employers' Liability Act applies.

Point (d) The deceased, discharged, was wilfully wounded before he could leave, while his status as to the petitioner was that of employee.

Point (e) The carrier is not liable under said Act for damages for a wrongful, not negligent, injury inflicted upon such interstate employee.

VI.

ARGUMENT.

Point (a) Although petitioner's employees were merely loading tools upon a lever car presently to be taken to and used in work upon the main line of an interstate carrier, this was employment interstate in character, although the actual work of laying rails had not begun.

New York Central R. Co. v. Winfield, 244 U. S. 147;

New York Central R. Co. v. Porter, 249 U. S. 168;

Kinzell v. C. & St. P. R. Co., 250 U. S. 130;

Pedersen v. D., L. & W. R. Co., 229 U. S. 446.

Point (b) A carrier's employee, upon his dismissal while at work, is entitled to a reasonable margin of time necessary to be used in passing from

the carrier's premises where his work is being done, during which the duties of master to servant persist.

Erie R. Co. v. Winfield, 244 U. S. 170, 173.

Bountiful Brick Co. v. Giles, 276 U. S. 154, 158.

While the decision of this Court in the case of Erie R. Co. v. Winfield, supra, was in the case of an employee who had completed his work, not because he was discharged but because the day was ended, the principle enunciated cannot be affected by the employee's reason for leaving. It is applicable where work is not to be resumed, whether because of a discharge while at work, or because the task for which the laborer is hired is completed, or where the employee expects to return after his night's rest. The very necessity of the case is the reason for this incident of the employment. The workman finds himself on the master's premises where his employment has required his presence. The reasonable opportunity to leave must have been contemplated by both employer and employee in the inception of the contract of employment.

Point. (c) Such incident of the employment of the deceased partook of the interstate character of the work then being done, and the Federal Employers' Liability Act applied.

This incident of the employment, the right to a reasonable margin of time necessary to be used in passing from the petitioner's premises where the work was being done and the discharge was effected, partook of the character of the work done that day, the making of repairs to and maintaining the interstate carrier's main line, and the intestate's employment necessarily was in interstate commerce.

In Erie R. Co. v. Winfield, 244 U. S. 170, where an interstate employee had taken his engine to the place where it was to remain for the night and while going over the yard tracks on his way home from the premises was struck by an engine and injured, the Court said (p. 173):

> "In leaving the carrier's yard at the close of his day's work the deceased was but discharging a duty of his employment. See North Carolina R. Co. v. Zachary, 232 U. S. 248, 260. Like his trip through the yard to his engine in the morning it was a necessary incident of his day's work, and partook of the character of that work as a whole, for it was not more an incident of one part than of another."

Point (d) The deceased, discharged, was wilfully wounded before he could leave, while his status as to the petitioner was that of employee.

The facts as testified to by eye witnesses, all testifying on behalf of the respondent, were that the deceased's discharge and the shooting were almost simultaneous. "There wasn't merely a moment, you might say" (Rec., p. 82). "The whole transaction happened very quickly" (Rec., p. 72). The foreman first said, "I don't need you any longer" (Rec., p. 46), "I ain't going to work you any more" (Rec., p. 103), and the intestate did not hear or understand him, but went into the tool house, brought out tools and placed them on the lever car (Rec., pp. 46, 103). The foreman then repeated, "I don't need you any longer," to which the intestate replied, "I am due to get my money in six hours after I quit," and, "I will go to see Mr. Long," who was the regular foreman (Rec., pp. 46, 53, 58, 67). The foreman then said, "I have just fooled with you long enough, you get away from here," drew a pistol and aimed it at the intestate (Rec., pp. 46, 53, 58, 67, 104), who said, "What are you going to do with that?" "I am going to make you eat it" (Rec., pp. 46, 53, 68, 104), but the deceased made no attempt to attack the foreman, had nothing in his hands, made no effort to draw a weapon and made no advance towards the foreman.
(Rec., pp. 46, 53, 68, 104). Thereupon he was shot, the shooting commencing when the intestate said that he would make Dodson eat the pistol (Rec., pp. 46, 48, 53, 55, 58-59, 68, 104-105).

Point (e) The carrier is not liable under said Act for damages for a wrongfful, not negligent, injury inflicted upon such interstate employee.

The intestate's injury and death did not result from the negligence of any of the defendant's officers, agents or employees, but from a wilful wrong, and there can be no recovery under the Federal Employers' Liability Act for an injury so inflicted.

Davis v. Green, 260 U. S. 349;
Atlantic Coast Line R. Co. v. Southwell's Admr., 275 U. S. 64.

Upon the evidence the deceased, an employee of years' standing (Rec., p. 143), was actually doing the work that he had been employed to do when petitioner's acting foreman told him that he did not need him any longer and then wantonly shot him. The deceased believed he was an employee, for a few minutes before, as he came to work, he said to the witness E. C. Thompson, after a short conversation, "Well, I will go down, I guess Dodson will fire me this morning" (Rec., p. 119), and when Thompson asked the reason, the deceased replied that "Dodson had been talking about him, and he told him if he didn't quit talking about him that one or tother of us would have to take a whipping." The foreman who shot him believed he was still an employee, for on the previous Saturday evening at quitting time, hours after the supposed discharge insisted upon by respondent, Foreman Dodson said

to the deceased (Rec., pp. 57, 61), "If you keep on yapping around here you won't have anything to do," and the deceased said nothing, continuing with his work—"He never raised up" (Rec., p. 61)—this was the foreman's last previous communication to or with Bryant.

There was no negligent act or omission whatever on the part of any officer, agent or employee of the petitioner.

Conclusion.

It is respectfully submitted that the Supreme Court of Appeals of Virginia has decided a Federal question of substance in its affirmance of the judgment here complained of, and has decided it in a way not in accord with applicable decisions of this Court.

Accordingly the judgment of the State court should be reversed.

Respectfully,

J. M. PERRY,
Counsel for The Chesapeake and Ohio Railway Company, Petitioner.

Staunton, Virginia.

FILE COPY

JAN 10 1
CHARLES ELMORE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 113

THE CHESAPEAKE & OHIO RAILWAY COMPANY, Petitioner,

v.

R. L. BRYANT, Administrator of M. L. Bryant, Deceased, Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA.

Supplemental Brief for the Chesapeake & Ohio Railway Company, Petitioner.

J. M. PERRY,
For the Petitioner,
Staunton, Virginia.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 113

THE CHESAPEAKE & OHIO RAILWAY COMPANY, Petitioner,

v.

R. L. BRYANT, Administrator of M. L. Bryant, Deceased, Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA.

To the Honorable, the Supreme Court of the United States:

The undersigned, counsel for The Chesapeake & Ohio Railway Company, petitioner, respectfully

prays leave to file the following supplement to the brief on the merits heretofore filed for the petitioner, touching certain matters appearing in the brief filed for the respondent.

SUPPLEMENTAL BRIEF FOR PETITIONER

I.

Preliminary Statement

In the brief for the respondent upon the merits under the heading, "Was Dodson an unfit and dangerous person to be placed in charge of defendant's section force?" (Respondent's Brief, pp. 29-34, inclusive), and again under the heading, "Defendant's sole reliance for reversal is that this case is governed by the Federal Employers' Liability Act" (Respondent's Brief, pp. 43-44), the respondent insists that the judgment in this case should be sustained under the Federal Employers' Liability Act (United States Code, Ch. 2, sec. 51) upon the second count of the respondent's declaration (Rec., p. 20). Because of the cases cited below and for the reason that the evidence so manifestly failed to support the averments of that count of the declaration, counsel for the petitioner disregarded it and that aspect of the case was not discussed in the petitioner's brief.

II.

Statement as to the Second Count of the Declaration

The second count of the respondent's declaration (Rec., p. 20) averred that the petitioner negligently employed as its foreman an unfit and dangerous person who "was liable in a fit of anger and passion to injure or kill any one of defendant's servants working under said foreman, or after being discharged by him," and that said foreman directed the deceased, petitioner's employee, to leave the work and employment and thereupon shot him, and charged that the deceased's death was caused by the petitioner's negligence in employing and keeping in its service a foreman who was unfit and a dangerous person to be in charge of its section hands.

III.

Summary Statement of Facts Touching the Averments of the Second Count of the Declaration

The respondent's brief (pp. 29-33) refers to and quotes certain testimony of respondent's witnesses that petitioner's acting foreman, Dodson, was a nervous, irritable man, quick tempered and hard to get along with, but omits to state that the very witnesses thus referred to further testified that they had never known Dodson to be involved in a personal difficulty and had never heard of him having

a fight (Rec., p. 131, Samuel J. Wright; pp. 106-7, W. M. McDowell; p. 114, Frank Alfred; pp. 133-4, E. C. Thompson).

Acting foreman Dodson was not a "fighting man" (Rec., p. 114), had never struck a man (Rec., p. 133), had no fights (Rec., pp. 134, 114) and no difficulty with any of the men, either on or off of the work (Rec., p. 114), so far as the witnesses referred to had observed or heard. There was no evidence to the effect that Dodson was vicious or dangerous.

The respondent's brief, without referring to the record, states that Dodson, with his employer's knowledge, carried a pistol and went about armed (Respondent's Brief, pp. 33, 34). The only evidence in the record upon the point is that of Long, foreman, who testified (Rec., pp. 147, 148, 157) that while Dodson was working as night watchman at a certain tunnel, during the winter preceding the shooting, he carried a pistol; that this was "when he was not in charge of any body of men" (Rec., p. 147), The statement referred to is not supported by the record.

IV.

Argument

In the case of Davis v. Green, 260 U. S. 349, the ground upon which the state court had held the carrier liable was that it had negligently employed a dangerous man, with notice of his characteristics, and that the killing occurred in the course of this

man's employment. It appeared (125 Miss. 476) that this employee, an engineer, already had killed a man and had the general reputation of being a dangerous, quarrelsome, and violent man. The Court said (p. 351):

> "The ground on which the railroad company was held was that it had negligently employed a dangerous man, with notice of his characteristics, and that the killing occurred in the course of the engineer's employment. But neither allegations nor proof present the killing as done to further the master's business, or as anything but a wanton and wilful act, done to satisfy the temper or spite of the engineer. Whatever may be the law of Mississippi, a railroad company is not liable for such an act under the statutes of the United States. The only sense in which the engineer was acting in the course of his employment was that he had received an order from Green which it was his duty to obey—in other words, that he did a wilful act wholly outside the scope of his employment, while his employment was going on. We see nothing in the evidence that would justify a verdict unless the doctrine of respondeat superior applies."

In the case of Atlantic Coast Line R. Co. v. Southwell, 275 U. S. 66, the plaintiff sought to recover against the carrier for its failure to prevent

the shooting of Southwell by its employee, Dallas, who, with the carrier's knowledge, was armed and had had a previous difficulty with Southwell, and the State court had upheld a judgment in his favor (191 N. C. 153). The Court, in disposing of this theory of liability, said (p. 65):

> "It would be straining the language of the act somewhat to say in any case that a wilful homicide 'resulted' from the failure of some superior officer to foresee the danger and to prevent it. In this case at all events we are of opinion that there was no evidence that warrants such a judgment. It is not necessary to state the facts in detail. . . . The only sinister designs of which there is any evidence were of Southwell against Dallas, unless Dallas' remark just before the shooting be taken to foreshadow the event, which it certainly did not seem to until after the event had happened. It appears to us extravagant to hold the petitioner liable in a case like this. See St. Louis-San Francisco R. C. v. Mills, 271 U. S. 344."

It is submitted that in the light of these authorities as well as because of the absence of any proof of negligence on the part of the petitioner, there can be no recovery under the second count of respondent's declaration.

V.

In reply to the charge in respondent's brief (Respondent's Brief, p. 8), that statements in the petitioner's brief are misleading and not according to the evidence in the record:

In each instance statements of fact in the petitioner's briefs are supported by references to the record. There they may be verified.

The petitioner's statement of the facts of the case has been consistent with the Virginia rule as to the effect of a demurrer to the evidence. The only testimony in the record as to occurrences when the deceased was shot, and as to what happened between the deceased and acting foreman Dodson on the Saturday preceding the Monday of the shooting, is that of the laborers who were present when the shooting occurred and of Dodson, who killed the deceased, all witnesses introduced by and testifying for the respondent, plaintiff below. All of the evidence of these witnesses, as well on their cross-examination as in chief, is to be considered in determining the facts proved. Ware v. Stephenson, 10 Leigh (37 Va.), 155; Horner v. Speed, 2 Pat. & H. (Va.), 616. The evidence of the witness is to be considered as a whole, and not detached statements only. Norfolk & W. R. Co. v. Holmes, 109 Va. 407. And, as was said in Hicks v. Romaine, 116 Va., 401, 411, while a party demurring to the evidence

"is considered as admitting the truth of his adversary's evidence, and all just inferences which can be properly drawn therefrom by a jury, he does not admit any fact not proven by the evidence, nor does he admit any forced or illogical deductions from the testimony.

"In Hansbrough v. Thorn, 3 Leigh (30 Va.), 156, the opinion by Tucker, J., uses the following language entirely pertinent to the case here in judgment: 'I will observe, before I proceed to pronounce on the particular case before us, that I think the expression " that the demurrant must admit, or is considered as admitting, every fact which the evidence may conduce to prove, " must not be understood too broadly. The language of this court is more appropriate " that the demurrant must be considered as admitting all that could reasonably be inferred by a jury from the evidence against him. " For evidence may conduce, that is, tend or contribute towards the proof of a fact which it is very far from establishing and which could not be fairly inferred from it.' "

VI.

In the brief filed for the petitioner counsel endeavored to state and argue the case fully. Now to reply to the discussion of the evidence contained

in the respondent's brief would be merely reiterating the substance of the petitioner's brief, upon which the petitioner places full dependence.

Respectfully submitted,

J. M. PERRY,

Counsel for The Chesapeake & Ohio Railway Company, Petitioner.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 192[illegible].

No. [illegible] 113

THE CHESAPEAKE & OHIO RAILWAY COMPANY, PETITIONER,

v.

BRYANT, R. L., ADMINISTRATOR OF M. L. BRYANT, DECEASED, RESPONDENT.

BRIEF FOR RESPONDENT OPPOSING WRIT OF CERTIORARI.

CHARLES CURRY,
For Respondent.

R. B. STEPHENSON,
CURRY CARTER,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928.

No. 934

THE CHESAPEAKE & OHIO RAILWAY COMPANY, PETITIONER,

v.

BRYANT, R. L., ADMINISTRATOR OF M. L. BRYANT, DECEASED, RESPONDENT.

BRIEF FOR RESPONDENT OPPOSING WRIT OF CERTIORARI.

I.

Is Not the Petition Founded Solely on Questions of Fact Finally Settled by the Decision of the State Court?

According to our view, after the admissions that we make, the only question for the Court to consider is, was Bryant in the employment of the petitioner when

he was shot by petitioner's section foreman, Dodson? The admissions we have always made in this case are stated in the opinion by Judge Burks (R. 165), as follows:

> "It is admitted by the plaintiff's counsel that, at the time of the shooting, the defendant and Dodson were engaged in interstate commerce; that the intestate was also engaged as a laborer for the defendant *up to the time of his discharge;* that the Federal Employers' Liability Act applies to employees so engaged and is the exclusive law applicable to employees so engaged; and that said act is applicable only to negligent acts by which such employees are injured, and does not apply to wilful injuries. *Whether or not the Federal Act, therefore, is applicable is dependent on whether Bryant was an employee of the defendant on Monday, August* 31, 1925, *the day of the shooting.*" (Italics supplied.)

If Bryant was still in the service of petitioner at the time he was shot, the Federal Employers' Liability Act applies, and the writ prayed for should be granted, but if he was not in such employment, then the case comes under the Virginia statutes, and the writ should be denied. The question, therefore, to determine is simply a question of fact, and we submit that the decision of the highest State Court on the question of the employment of Bryant is final.

It has been held by this Court in a long line of decisions that the findings of fact by a State Court are conclusive upon this Court. *Dower* v. *Richards,* 151

U. S. 658; *Bartlett* v. *Lockwood*, 160 U. S. 357; *Hedrick* v. *Atchison, T. & S. F. Ry. Co.*, 167 U. S. 673; *Keckuk & H. Bridge Co.* v. *Illinois*, 175 U. S. 626; *Gardner* v. *Bonestell*, 180 U. S. 362; *Western U. Tel Co.* v. *Call Pub. Co.*, 181 U. S. 92; *Jenkins* v. *Neff*, 186 U. S. 230; *Adams* v. *Church*, 193 U. S. 510; *Hill* v. *McCord*, 195 U. S. 395; *Chrisman* v. *Miller*, 197 U. S. 313; *Gulf, C. & S. F. R. Co.* v. *Texas*, 204 U. S. 403; *Chapman & D. Land Co.* v. *Bigelow*, 206 U. S. 41; *Waters Pierce Oil Co.* v. *Texas*, 212 U. S. 86; *Thomas* v. *Texas*, 212 U. S. 278; *Rankin* v. *Emigh*, 218 U. S. 27; *Miedreich* v. *Lauenstein*, 232 U. S. 236; *Ætna L. Ins. Co.* v. *Dunken*, 266 U. S. 389.

It is true there are exceptions to this general rule, but it is not pretended or claimed by petitioner that the instant case comes under either of them. This Court stated the general rule and the exceptions in the case of *Ætna L. Ins. Co.* v. *Dunken*, 266 U. S. 389, 394, *supra*, as follows:

> "The rule is settled that the decision of a state court upon a question of fact ordinarily cannot be made the subject of an inquiry here. See, for example, Missouri, K. & T. R. Co. *v.* Haber, 169 U. S. 613, 639, 42 L. ed. 878, 887, 18 Sup. Ct. Rep. 488; Smiley *v.* Kansas, 196 U. S. 447, 453, 454, 49 L. ed. 546, 550, 25 Sup. Ct. Rep. 289. To this general rule there are two equally well-settled exceptions: "(1) Where a Federal right has been denied as the result of a finding shown by the record to be without evidence to support it, and (2) where a conclusion of law as to a Federal right and findings of fact are so

> intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts." Northern P. R. Co. *v.* North Dakota, 236 U. S. 585, 593, 59 L. ed. 735, 740, L. R. A. 1917F, 1148, P. U. R. 1915C, 277, 35 Sup. Ct. Rep. 429, Ann. Cas. 1916A, 1, and cases cited. See also Truax *v.* Corrigan, 257 U. S. 312, 324, 325, 66 L. ed. 254, 259, 260, 27 A. L. R. 375, 42 Sup. Ct. Rep. 124."

It will be seen that it is obvious that neither of these exceptions applies to this case, and this Court has no jurisdiction to review the evidence upon a *pure* question of fact, although a Federal question would or would not be presented according to the way in which the question of fact might be decided. *Dower* v. *Richards,* 151 U. S. 658. Nor is the general rule as to the finding of fact affected, although the finding of an inferior State Court was affirmed by a divided State Court. As said by this Court in the case of *Minneapolis & St. L. R. Co.* v. *Minnesota, ex rel. Railroad & Warehouse Commission,* 193 U. S. 53:

> "It is well established that on error to a state court this court cannot re-examine the evidence, and when the facts are found we are concluded by such finding. Egan *v.* Hart, 165 U. S. 188, 41 L. ed. 680, 17 Sup. Ct. Rep. 300. But in the case at bar we are met by the circumstance that the supreme Court equally divided on the question whether the facts distinguish this case from 76 Minn. The plaintiff in error, therefore, contends that there has been no judgment of the supreme court on the facts, and they are open to review here. The contention is not tenable.

> There is no statement of facts by the supreme court, and its decision, though by a divided court, constituted an affirmance of the finding of the district Court. * * * The finding, like the verdict of a jury, is conclusive in this court. Dower *v.* Richards, 151 U. S. 658, 38 L. ed. 305, 14 Sup. Ct. Rep. 452."

Judge Burks, after reviewing the evidence on the question of whether Bryant was still in petitioner's employment when the tragedy complained of happened, said, in passing on the question whether the Federal statute applies (R. 165-6):

> "Bryant was employed by the day, and either party had the right to terminate the service at will, without notice. Dodson, it is clear from the testimony, had the right to discharge him, and, independent of any other evidence in the case, *Dodson testified that he discharged him on the previous Saturday. On a demurrer to the evidence, this fact must be accepted as established.* It is unnecessary, therefore, to make any further reference to the able argument of counsel and the cases cited by them, on the questions above mentioned. Counsel agree, except as to the time of the discharge, *and this is concluded, on a demurrer to the evidence, by the testimony of Dodson.* There are no conflicts of evidence on a demurrer to the evidence. The concessions made by the demurrer eliminate the conflicts. *Bryant was not an employee of the company at the time of the shooting.* The case, therefore, is controlled by the State statute." (Italics supplied.)

There is not a scintilla of evidence in the record that Bryant was not discharged on Saturday, two days before the shooting, and the pretension here that Bryant was shot immediately after he was discharged is without any foundation whatever in fact. Mr. L. E. Crance, Supervisor of Tracks (R. 137), called as a witness for petitioner, said in chief (R. 141):

> "I said (to Dodson) tell him (Bryant) to leave and draw his money, I don't want him any longer if he don't want to work."
>
> Q. "That was on Saturday afternoon?"
>
> A. "Yes sir."

The first question propounded to Mr. Crance on cross-examination (R. 141) was:

> Q. "You in fact discharged him yourself, or directed his discharge?
>
> A. "Yes sir, I directed it."

In any view of the case that can be taken, it was a fact to be determined by the jury or the Court on a demurrer to the evidence, whether or not Bryant was in the employment of petitioner in interstate commerce when he was shot.

As in the instant case, the sole question at issue in *Pennsylvania Co.* v. *Marion Donot*, 239 U. S. 49, was whether or not the plaintiff, Donot, at the time he was injured, was engaged in interstate commerce. The trial Court refused a request to charge that the plaintiff was not engaged in interstate commerce when the accident occurred, and therefore could not recover.

That question was referred to the jury to determine, which found for the plaintiff, and judgment was entered on the verdict. The trial Court was sustained by the Circuit Court of Appeals, and when the case had been brought to this Court on writ of error, there was a motion under Rule 6, section 5, to affirm the judgment. In sustaining the motion to affirm, this Court said:

> "The question presented upon this writ of error is 'so frivolous as not to need further argument', and the motion to affirm the judgment below must be granted (Rule 6, Sec. 5)."

and the Court, in concluding the opinion, said:

> "The trial court submitted to the jury for determination whether he (the plaintiff) was engaged in interstate commerce at the time of the injury, and in approving such action (224 Fed. 1021) the Circuit Court of Appeals was clearly right."

Petitioner has assigned other grounds for the writ of certiorari, but they are clearly subsidiary and dependent upon the question whether or not Bryant was in the employment of petitioner in interstate commerce at the time of the fatal shooting, and, as said by this Court in *Erie R. R. Co.* v. *Solomon,* 237 U. S. 427:

> "As a proposition which is unsubstantial and frivolous cannot be made substantial by asserting another proposition of the same character, it results that there is no ground for the exer-

cise of jurisdiction, and the writ of error is therefore dismissed for want of jurisdiction."

Does it not appear that there is no reasonable ground for granting the prayer of the petition, and that respondent is entitled to damages for his delay, and to single or double costs, as provided for in section 237 of the Judicial Code?

We hardly deem it necessary to say more, but, as Lord Coke said, "abundans cautela non nocet".

II.

The Theory That Bryant's Employment Continued a Reasonable Time After His Discharge.

It is admitted by petitioner that Bryant had been discharged from its service before he was shot, but it is claimed and pretended that the discharge was closely followed by the shooting, and before Bryant had been given a reasonable time to leave petitioner's work and premises, and that in contemplation of the Federal statute, the employment of Bryant in interstate commerce continued to so exist until that reasonable time had elapsed. *This is, as we view the application, the only real ground upon which the application for a writ of certiorari is founded.* Petitioner, however, ignores altogether the admitted fact on the demurrer to the evidence that Bryant had been discharged on Saturday before the Monday on which the shooting occurred.

The question as to whether a servant, whose job of work had ended, was still in the employment of his

master until he had had time and opportunity to safely leave the employment, so as to bring the case under the fellow-servant doctrine, was held by this Court to be a question of fact for the jury in the case of *The Northwestern Union Packet Co.* v. *McCue's Admrx.*, 84 U. S. 508. The Court said in that case:

> "The case is substantially this: Patrick McCue was a common laboring man living in Prairie du Chien, Wisconsin, and employed in the railroad warehouse in that place. On the evening of the 11th of July, 1868, the steamer, War Eagle, owned by the plaintiff in error, arrived at the landing in Prairie du Chien, for the purpose of taking freight from the warehouse. Being short of hands, the officers of the boat employed McCue and four or five other persons to assist in carrying freight from the warehouse and putting it on board the boat. This employment was continued about two hours and a half, at the end of which time McCue and the rest were requested to go to the office of the boat and receive their pay. They proceeded there accordingly, were paid, and then started to go ashore. The men on board the boat pulled in the gang plank while McCue was on it, who was thus thrown down and injured, from which injury he died.
>
> "It is insisted on the part of the plaintiff in error that a master is not responsible to a servant for injuries caused by the negligence or misconduct of a fellow servant engaged in the same general business. Whether this general proposition be true or not it is not necessary to determine in the state of this record. It is conceded, if the employment of McCue by

the company terminated before the injury complained of was suffered, that the company is liable, and this the jury have found to be the fact.

"But it is said it was the province of the court, and not the jury, to determine the point of time at which the service was ended; that as the facts were undisputed, it was a question of law, and the court should have told the jury the relation of master and servant subsisted when the accident happened.

"We do not think so. One of the theories on which the suit was prosecuted was that McCue's special employment had ceased when he was injured. This theory was resisted by the defense, and the court, not taking upon itself to determine as an absolute proposition when the employment terminated, left it to the jury to find how the fact was. This ruling, in our opinion, was correct. It was for the jury to say, from the nature of the employment, the manner of engaging the hands, the usual mode of transacting such a business, and the other circumstances of the case, whether the service had or had not ceased at the time of the accident. The point was submitted fairly to the jury, with no more comments than the evidence justified. It was argued by the plaintiff in error that the employment of necessity terminated on the land, because it was there McCue was engaged to do the work, and he had a right to be provided with the proper means of reaching it from the boat. On the contrary, the defendant in error contended the special service ceased when McCue had finished his work and was paid off; that after this he was not subject to the control

> or direction of the officers of the boat, but at liberty to stay on the boat or go off as he pleased. The jury took this latter view of the relation of the parties, and we cannot say that they did not decide correctly. At any rate, their decision on a question of fact is not subject to review in this court. The defense at best was a narrow one, and in our opinion more technical than just."

A number of authorities have been cited by petitioner showing that a servant's employment extends to going to and leaving his work, but no authority has been cited or referred to that shows that the employment of a servant is extended for the benefit of the master after the servant has been discharged. The going to and leaving the work are necessary incidents of the servant's employment. This was implied in the contract of service. If, however, a servant while at work is discharged, the relation of master and servant terminates and ends, and the servant at once becomes a mere licensee to leave the master's premises, and if he refuses to leave when commanded, he at once becomes a trespasser.

Is it not apparent that the same principle cannot apply to a discharged servant, as in a case where a servant had completed his day's work, and as he was leaving his work or his master's service, was injured by the negligence of the master or his servant? The leaving of the master's premises by an employee, and the leaving of the master's premises by a discharged servant, obviously stand on very different principles—the one is founded on a contractual relation, but the

other has no such relation with his late master. Their relationship has been ended or extinguished—they have become strangers. Is it not a strained or fallacious view of petitioner that Bryant was still in its employment in interstate commerce after he had been discharged?

III.

Admissions of Petitioner in the Record That Bryant Had Been Discharged Two Days Before the Shooting.

The pretension of petitioner that the discharge and the shooting were almost simultaneous is altogether an after-thought. No such claim was made until after judgment had been rendered on the demurrer to the evidence by the trial court. Petitioner admitted in the fourth ground of its demurrer to the evidence (R. 160) *"That the plaintiff's intestate was discharged from the defendant's employment on Saturday, prior to the Monday of the shooting complained of, and not on said Monday,"* and in the seventh ground of its demurrer to the evidence (R. 161) admitted *"That the shooting of said intestate by said Dodson was entirely separate in point of time and occasion from said intestate's discharge from the defendant's employment, and was not done in the course of discharging intestate."*

This was a solemn admission in the pleading, for at common law and in Virginia a demurrer to the evidence is a pleading. Burks Pl. & Pr., 2nd Ed. 469. *Lynchburg Foundry Co.* v. *Dalton*, 121 Va. 480; *Chesa-*

peake & Ohio Ry. Co. v. *Sparrow*, 98 Va. 650; *Mandeville* v. *Perry*, 6 Call. 78 (Va.). It is true that these statements were made in the grounds of demurrer to the evidence, but under Sec. 6117 of the Code of Virginia, 1919, the grounds of demurrer are part of the demurrer, and the Court is without jurisdiction to consider such a demurrer unless the grounds are so stated. In *Saunders* v. *Southern Ry. Co.*, 117 Va. 396, the Virginia Court said, at p. 399:

> "The clear and explicit terms are that, in all suits or motions hereafter, the party tendering the demurrer to evidence shall state in writing specifically the grounds of demurrer relied on, and that no grounds of demurrer shall be considered unless they be thus specifically stated. These statutory provisions are mandatory and preclude the idea of jurisdiction to consider a demurrer to evidence, unless the grounds of such demurrer are specifically stated in writing."

Is not petitioner bound by admissions in its demurrer to the evidence? 2 Wig. on Ev., sec. 1063, 1064, 2nd Ed.

IV.

Petitioner's Theory That, Having Pleaded the Federal Statute, This Court Has Jurisdiction.

It is stated in the brief of petitioner's counsel, page 13, "that a controlling Federal question is necessarily involved, since the petitioner's pleadings refer to and rely upon the Federal Employers' Liability Act to de-

feat a recovery." Can it be claimed with any seriousness that the mere raising of a Federal question by a plea gives this Court jurisdiction? There must appear more than a bare assertion of reliance on the Federal statute or a Federal question in a pleading. *Millingar* v. *Hartupee*, 6 Wall. 258.

> "A real and not a fictitious Federal question is essential to the jurisdiction of this court over the judgment of a state court."
>
> *Hamblin* v. *Western Land Co.*, 147 U. S. 530.

If the contention of petitioner is correct, as stated in the Hamblin Case, *supra*, "a Federal question might be set up in almost any case and the jurisdiction of this Court invoked simply for the purpose of delay." It is well settled, as said by this Court in the case of *Sawyer* v. *Piper*, 189 U. S. 157, "that the mere averment of such a question is not sufficient."

V.

The Assertion in the Argument of Petitioner's Counsel, Brief, Page 13, That the Evidence Shows That Bryant was Discharged Just Before he was Shot.

Petitioner's counsel apparently with much earnestness urges that the discharge of Bryant and the shooting were almost simultaneous. On page 18 in the brief of counsel for petitioner it is stated "that the intestate was wounded by petitioner's foreman immediately after being discharged."

The record will be searched in vain for any evidence to establish this. Dodson, the petitioner's foreman, who shot Bryant, was called as a witness for respondent, and was asked (R. 84-5):

Q. "Do you know whether Bryant had been discharged from the C. & O. service when he was mortally wounded?"
A. "Yes sir."
Q. "When was he discharged?"
A. "He was discharged on Saturday."
Q. "On what day was the shooting?"
A. "On Monday morning."
Q. "On the following Monday morning?"
A. "Yes sir, the following Monday morning."
Q. "Who discharged him from the C. & O. service?"
A. "I did myself."
Q. "Did you have authority to do that?"
A. "Yes sir."

On Monday morning following the discharge, Bryant went back to offer himself for work. His regular foreman was petitioner's witness, E. C. Long, who said (R. 159) that Bryant was a good worker. Bryant no doubt was loath to leave the service, and went back after his discharge on Saturday reasonably hoping that Long might be in charge, and that he (Bryant) might be taken back on the section force. When he got to the tool-house, where the force was making ready to go to work, Dodson told Bryant that he had been discharged on Saturday, and that he could not work (R. 93). Bryant at first paid no attention to what

Dodson said, and Dodson repeatedly told him to leave, to get on up the road, and Bryant refused to leave at the point of a gun, and the shooting began.

On the demurrer to the evidence it is clearly an admitted fact by petitioner that Bryant was discharged on Saturday, and its Supervisor of Tracks, Mr. L. E. Crance, as we have pointed out *supra,* had directed Dodson to discharge Bryant on the Saturday before the shooting. In petitioner's demurrer to the evidence, as we have pointed out *supra,* it expressly admitted that Bryant had been discharged on Saturday, and there is no evidence whatever that shows or tends to show that Bryant was discharged on Monday morning, immediately before he was shot.

It is stated in the petition, page 4, that petitioner had objected to the testimony as to Bryant's being discharged on Saturday. It will be observed, however, that there was no bill of exception, or certificate of exception, taken by petitioner, nor was there a motion to strike out this evidence or any evidence, and petitioner afterwards introduced Mr. Crance and brought out the same evidence, with reference to the discharge on Saturday, that had been testified to by Dodson. It will be seen by reference to the case of *N. & W. Ry. Co.* v. *Warden,* 117 Va., 801, 804, cited by petitioner, that it has no application whatever in this case, and it will be further seen that no objection to the admissibility of evidence was ever relied on or made in this case, and was not referred to in the assignments of errors in petitioner's petition for a writ of error (R. 4). There were only two assignments of error made:

"First. The defendant cannot be held liable under the Federal Employers' Liability Act, which applies here to the exclusion of any other statute or rule of law since the intestate's injury and death did not result from the negligence of any of the defendant's officers, agents or employees."

"Second. Dodson, who shot the plaintiff's intestate, was not acting within the scope of his employment by the defendant, or in the prosecution of the defendant's work, in attacking and injuring the plaintiff's intestate."

No other error or errors were or could be relied on in the State court.

"A petition (for writ of error) is a pleading and must conform to the rules of pleading with respect to certainty and distinctness of allegation of errors relied on for reversal, otherwise they will not, as a rule, be considered."
Ewell v. *Brock,* 120 Va., 475, 480.
Burks Pl. & Pr., 2nd Ed., 770, 771.

VI.

Petitioner's Theory That There was No Evidence to Show That Dodson Had Authority to Expel Trespassers.

Whether Dodson had authority to expel trespassers on petitioner's property is immaterial as we take it here. That question, however, was a question of fact, and was settled by the State Court. The evidence of petitioner's own witness, Crance, shows that Dodson, or petitioner's foreman, had general authority over

petitioner's property. He said (R. 141) "the duties of a section foreman (among other duties stated) is to look after the company's property in general." We cannot see how petitioner can claim that the question as to whether Dodson had the right to eject a trespasser from petitioner's premises can in any way show or tend to show or raise a Federal question or a question under the Federal statute here relied on by petitioner.

VII.

The Claim That the Action of the Supreme Court of Appeals of Virginia Emphasizes the Propriety of a Review by This Court, Brief, Page 19.

There is nothing in the record that shows or tends to show that the Virginia Court had any doubt about the fact that the State statute applies in this case and not the Federal statute. The State Court could have no doubt about Bryant's having been discharged two days before he was shot. That was an admitted fact on the demurrer to the evidence, and petitioner made that admission in the record, as we have pointed out *supra*. If Bryant was discharged on Saturday before the Monday on which he was shot, the Federal statute could have no application.

The statute provides "that every common carrier by railroad while engaged in interstate commerce between any of the several states * * * shall be liable in damages to any person suffering injury while he is engaged by such carrier in such commerce, or, in case of the death of such employee, to his personal

representative * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier * * *." 45 U. S. C. A., sec. 51, p. 92.

From the very terms of the statute two circumstances must necessarily concur for the application of this statute to the instant case:

First. The petitioner must have been a railroad engaged in interstate commerce at the time that its servant and section foreman, Dodson, shot and killed the deceased, Bryant; and

Second. Bryant must have been in the employment of petitioner in such commerce at the time of the fatal shooting.

This Court said in the case of *Pederson* v. *Delaware, etc., R. Co.* 229 U. S. 146, "considering the terms of the statute, there can be no doubt that a right of recovery thereunder arises only where the injury is suffered while the carrier is engaged in interstate commerce, and while the employee is employed by the carrier in such commerce."

It was said and held by this Court in the case of *North Carolina R. R. Co.* v. *Zachary,* 232 U. S. 248, 256:

> "In order to bring the case within the terms of the Federal Act, defendant must have been, at the time of the occurrence in question, engaged as a common carrier in interstate commerce, and plaintiff's intestate must have been employed by said carrier in such commerce."

It will be seen by reference to the opinion deli vered by Judge Burks that there can be no question about the Virginia statute applying. The Court could have had no doubt about this because the evidence sh owing that the State statute alone applies is so clear a nd so conclusive that any layman could see and kno w and understand that the Federal statute could not apply. The only difficulty that the State Court had was as to whether Dodson, within the scope of his auth ority, killed Bryant, and this is apparent from the o pinion of Judge Burks.

VIII.

Conclusion.

It is submitted, in conclusion, that Bryant w as not in the employment of petitioner in inter state com merce at the time he was shot; that the Federal statute has no application; that the State statute governs, an d that no Federal question is involved. We submit th at the writ of certiorari prayed for should be denied.

Respectfully submitted,

CHARLES CURRY,
For Respondent, R. L. Bryant,
Administrator of the Estate of
M. L. Bryant, Decea sed.

R. B. STEPHENSON,
CURRY CARTER,
Of Counsel.

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CHARLES ELMORE

Supreme Court of the United States

OCTOBER TERM, 1929.

No. 934 113

THE CHESAPEAKE & OHIO RAILWAY COMPANY, Petitioner,

v.

BRYANT, R. L., Administrator of M. L. Bryant, Deceased, Respondent.

MOTION OF RESPONDENT TO DISMISS,

and

BRIEF IN SUPPORT OF THE MOTION.

CHARLES CURRY,
For Respondent.

R. B. STEPHENSON,
CURRY CARTER,
Of Counsel.

(34,243)

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

934

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, Petitioner,

v.

BRYANT, R. L., Administrator of M. L. Bryant, Deceased, Respondent.

NOTICE, MOTION AND BRIEF OF ATTORNEY FOR RESPONDENT.

I.

Notice of Submission of Motion to Dismiss.

Mr. J. Martin Perry, Attorney for the Chesapeake and Ohio Railway Company, Petitioner:—

Please take notice that on Monday, the 18th day of November, 1929, at the opening of the Court, or

as soon thereafter as I can be heard, the motion, of which the attached is a copy, will be submitted to the Supreme Court of the United States for the decision of the Court thereon.

Annexed hereto is a copy of my brief which will be submitted with said motion and in support thereof; and I will also rely on my brief opposing writ of certiorari in support of said motion.

Given under my hand this the 2nd day of November, 1929.

CHARLES CURRY,

Attorney for Bryant, R. L., Administrator of M. L. Bryant, Deceased, Respondent.

Service of the above notice is accepted, this November 2, 1929.

J. M. PERRY,

Attorney for the Chesapeake and Ohio Railway Company, Petitioner.

II.

Motion to Dismiss.

This day came the respondent, in the above entitled case, by his Attorney, Charles Curry, and moved the Court to dismiss the writ of certiorari to the Supreme Court of Appeals of Virginia, here-

tofore granted in this case, for want of jurisdiction; because the said writ was improvidently granted, as the jurisdiction of this Court depends on a sole question of fact that was passed on and settled by the State Courts against petitioner; and the question of fact referred to was, whether, or not, the deceased was in the employment of the petitioner, in interstate commerce, at the time of the fatal shooting complained of, and the evidence was that he had been so employed, but had been discharged from the employment of petitioner, two days before the shooting, and was not in its employment at the time of the shooting.

CHARLES CURRY,

Attorney for Bryant, R. L., Administrator of M. L. Bryant, Deceased, Respondent.

III.

Brief of Charles Curry, Attorney for Respondent in Support of Said Motion.

In this brief the petitioner will be referred to as the defendant, the respondent as the plaintiff, and the deceased as Bryant.

IV.

The Federal Employers Liability Act Does Not Apply, as Bryant Was Not an Employee of Defendant When He Was Shot.

It is not pretended, nor claimed by the defendant that any Federal question is involved in this case that gives this Court jurisdiction, unless it comes under the purview of the Federal Employers Liability Act. U. S. C. A. 45 p. 92 Sec. 51.

The defendant was a common carrier by rail engaged in commerce between the States, and for this case to come under the Federal Statute, Bryant must, at the time he was shot, have been employed by the defendant in interstate commerce. He had been for several years so employed (R. 143), as a section laborer, but had been discharged from defendant's service before the shooting occurred. The Federal Statute did not control unless Bryant was actually in the defendant's service in interstate commerce at the time of the tragedy. It was therefore, necessarily a question of fact as to whether or not he had been discharged from defendant's service. The State Courts held that, on the evidence, Bryant had been discharged and was not in the employment of the defendant at the time of the fatal shooting, and that, therefore, the Federal Statute has no application, and that the case comes under the Virginia death loss statute. Va. Code 1919, Sec. 5786.

It was a simple question of fact, as to which statute applied, and this having been decided by the

State Courts in favor of the plaintiff is final and binding upon this Court.

This Court said in the case of Egan v. Hart 165 U. S. 180, 41 L. Ed. 680:

> "On error to a State Court, this Court cannot re-examine the evidence, and, when facts are found below, is concluded by such finding."
>
> See the cases referred to by us in our brief opposing writ of certiorari, 2 and 3.

The general rule of this Court that the judgment of a State Court on a question of fact can not ordinarily be inquired into and considered has two well settled exceptions: (1) "Where a Federal Right has been denied as the result of a finding shown by the record to be without evidence to support it; and (2), where a conclusion of law as to a Federal right and finding of fact are so intermingled as to make it necessary in order to pass on the Federal question, to analyze the facts." Aetna Life Ins. Co. v. Dunkan 266 U. S. 389-394, quoted from and considered in our brief opposing writ of certiorari, 3 and 4.

These exceptions have, however, no application to this case, nor have they been relied on by petitioner.

In the case of Missouri K. & T. R. Co. v. West 232 U. S. 682, 58 L. Ed. 795, this Court held that:

> "Whether the injured person was not an employee of the railway company causing the injury, is a **question of fact,** and if there is a finding supported by the record that he was not, this Court cannot review the judgment of the State Court. Syllabus.

Justice McKenna in the West case supra said:

> "The State Court having decided, with substantial grounds for the decision, that the pleadings and evidence show an action under the employment by the express company, no denial of Federal right is involved, and therefore, motion to dismiss must be granted. And as the action was brought under the State law, and not under the Federal law, it becomes unnecessary to notice errors assigned by the railway company, including that based on the instruction of the trial court that a verdict could be rendered by three-fourths of the jury."

The evidence in this case supporting the finding of the State Court is as shown in the opinion of Judge Burks, R.164-65-66, strong and decisive; and is it not obvious that this case comes under the Virginia, and not the Federal Statute, and that this Court has no jurisdicion, and that on our motion

ought to be dismissed under authority of the West case supra?

V.

This action was brought under the Virginia Statute and the defendant pled that it comes under the Federal Statute.

The plaintiff assumed when he brought his suit that Bryant was not an employee of the defendant when the mischief complained of happened, and proceeded under the Virginia Statute, which in so far as it relates to this case, provides:

> "Whenever the death of a person shall be caused by the wrongful act, neglect, or default of any person or corporation * * *, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action * * *, and to recover damages in respect thereof, then, and in every such case, the person who, or corporation ***, would have been liable, if death had not ensued, shall be liable to an action for damages * * *, and although the death shall have been caused under such circumstances as amount in law to a felony." Virginia Code 1919. See 5786.

Bryant was shot by defendant's servant and section foreman, Don Dodson, on Monday morning,

August 31, 1925; and this action was begun on the 19th day of May, 1926, in the Circuit Court of Alleghany County, Virginia. At the July term of that court, the defendant appeared and pled "not guilty," and the case was continued; and at the next term the defendant, on October 15, 1926, filed a special plea avering, in effect, that the Federal Employers Liability Act, U. S. C. A., Title Railroads, 45 p. 92 Sec. 51, controls. R. 21-22, R. 22.

The Federal Statute, in so far as of interest here, provides:

> "Every common carrier by railroad while engaged in commerce between any of the several states * * *, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, or his or her personal representatives, * * *, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier * * *."

The plaintiff replied to defendant's special plea and denied that Bryant was in the employment of the defendant in interstate commerce, at the time of the happening of the mischief complained of, R. 24.

The plaintiff moved to strike out defendant's special plea, but his motion was over-ruled; and the

defendant moved the court to reject the plaintiff's replication, when it was offered, but the motion was over-ruled, R. 23-24.

On April 27, 1927, the defendant filed three grounds of defense. R. 24-25. The third ground was that it was engaged in interstate commerce and that Bryant was in its employment in such commerce, at the time of the shootting complained of, R. 25, and the trial was forthwith begun. Evidence was introduced both on behalf of the plaintiff and defendant, and when both had rested, the defendant demurred to the evidence "with its statement of grounds thereof" in writing, and the plaintiff joined therein ,R. 26, and the demurrer and grounds of demurrer are set out in the record, R. 160-161. The jury assessed the damages at Eight Thousand Dollars ($8,000.00) and, the court finding that the law, on the evidence, was with the plaintiff, over-ruled the demurrer and gave judgment for the plaintiff for Eight Thousand Dollars ($8,000.00), R. 26.

It will thus be seen that the issue as to whether or not Bryant was employed by defendant in interstate commerce, at the time of the tragedy was clearly made by the pleadings, and was without question, an issue of fact, and on the evidence was decided for the plaintiff.

The judgment of the trial court was that the Federal Statute does not apply. This judgment was affirmed by the Supreme Court of Appeals of Virginia by a full court, January 19, 1928, R. 176-

177; and see the opinion of the Court delivered by Judge Burks, R. 163 et seq. This learned Justice, after reviewing the evidence, as to whether Bryant was in the employment of the defendant when he was shot, said in his opinion, R. 166:

> "Bryant was not an employee of the company (the defendant) at the time of the shooting. The case, therefore, is controlled by the State Statute."

This Court said in the case of Clipper Mining Co. v. Eli Mining & Land Co. 194 U. S. 220-222, 48 L. Ed. 944-948:

> "It is the settled rule that this Court, in an action of law, at least, has no jurisdiction to review the conclusions of the highest Court of the State upon questions of fact." Citing numerous cases.

The Supreme Court of Appeals of Virginia, in effect, held that the question whether or not Bryant was an employee of the defendant, at the time of the shooting, was a mere minor question, because following the above quotation from the opinion by Judge Burks, it is said, R. 166:

> "The chief question involved is, was Dodson acting in the course of his employment, or within the scope of his au-

> thority when he shot Bryant." (And this was a question of fact.)

The case was afterwards reheard on a petition for rehearing; the petition was first refused, R. 186, and was afterwards granted, R. 187, and on the rehearing was decided by a divided Court, R. 188.

The question upon which the Court divided, however, could not have been whether Bryant was in the employment of the defendant, at the time of the shooting, for there is no evidence that shows that he was so employed when the shooting occurred. It was in fact admitted by defendant that Bryant had been discharged from its service before the shooting. The only difference between the plaintiff and the defendant was as to the time of the discharge. Judge Burks said in the opinion of the State Supreme Court, R. 165-166:

> "Bryant was employed by the day, and either party had the right to terminate the service at will, without notice. Dodson, it is clear from the testimony, had the right to discharge him, and, independent of any other evidence in the case, Dodson testified that he discharged him on the previous Saturday. * * * Counsel agree, except as to the time of the discharge, and this is concluded, on a demurrer to the evidence, by the testimony of Dodson."

The shooting occurred on Monday morning, August 31, 1925, and Dodson, who was the defendant's section foreman, R. 84, said, R. 84-5, that he discharged Bryant on Saturday, August 29, 1925. Dodson, who himself had authority to discharge defendant's servants, working under him, R. 85, said that he discharged Bryant with the approval of Mr. L. E. Crance, R. 86. Bryant was the plaintiff's witness; and Mr. L. E. Crance was the defendant's witness and supervisor of tracks, and he said in chief, R. 141: **"I said (to Dodson) to tell him (Bryant) to leave and draw his money."** And the witness was then asked, R. 141: **"Q That was on Saturday afternoon?"** And the witness answered: **"Yes, sir."** Then followed the cross examination of Mr. Crance by plaintiff's Attorney, and the first question on cross examination asked him was: **"You in fact discharged him yourself or directed his discharge?"** And he answered: **"Yes, sir, I directed it."**

The fact that this case was finally decided by a divided Court in no way affects the general rule of this court, that the finding on facts by a State Court is final and conclusive. Minneapolis and St. L. R. Co. v. Minnesota, ex rel. Railroad and Warehouse Commission, 193 U. S. 53, which is quoted from in our brief opposing writ of certiorari, 4 and 5.

VI.

Can It Be Pretended by the Defendant With Any Sincerity That the Federal Statute Controls and That This Court Has Jurisdiction?

Defendant admitted in its demurrer to the evidence that Bryant was not in its employment when the shooting occurred. It is very true that this admission was made in defendant's grounds of demurrer to the evidence, but grounds of demurrer to the evidence are part of the demurrer itself. A demurrer to the evidence without the grounds stated in writing, is a vain thing under the Virginia Statute, Virginia Code, 1919, Sec. 6117. That Statute provides:

> "The party tendering a demurrer to the evidence shall state in writing specifically the grounds of demurrer relied on, * * * nor shall any ground of demurrer not thus specifically stated be considered * * *."

Our Virginia Court, in passing on and construing this Statute, said in Saunders v. So. R. Co. 117 Va., p. 399:

> "These statutory provisions are mandatory and preclude the idea of jurisdiction to consider a demurrer to the evidence, unless the grounds of such demurrer are specifically stated in writing."

And it must be observed that a demurrer to the evidence is a pleading, both at common law and in Virginia, Burks Pl. & Pr. (2d Ed.) 469. This admission of the defendant that Bryant was not in its service at the time of the shooting is a solemn admission, and we believe is binding and conclusive against the defendant. But if the grounds of demurrer to the evidence are not part of the demurrer, does that make any difference as to the force and effect of the admission?

The defendant said in its fourth ground of demurrer, R. 160:

> "That the plaintiff's intestate was discharged from defendant's employment on Saturday prior to the Monday of the shooting complained of, and not on said Monday, and said Dodson shot the plaintiff's intestate in the course and as the result of a private quarrel and misunderstanding, and not as a part of, and in the course of said Dodson's employment."

And in its seventh ground of demurrer, R. 161, said:

> "That the shooting of said intestate by said Dodson was entirely separated in point of time and occasion from said intestate's discharge from the defendant's employment, and was not done in the course of discharging intestate or in the course of said Dodson's employment or within the scope of his duties."

The admissions thus made by the defendant are founded on the evidence in the record. See the review of the evidence on the question of Bryant's discharge in the opinion of Judge Burks, R. 164-5.

VII.

The Burden Was on the Defendant to Prove That Bryant Was in Its Employment at the Time of the Shooting.

The defendant, in order to bring this case under the Federal Statute, was bound to show by a preponderance of evidence that Bryant was in its employment at the time of the shooting. This is clear from the very language of the Federal Statute. That Act has no application to an employee who is injured while not engaged in interstate commerce; nor does it apply to one who is not in the employment of an interstate railway at the time of his in-

jury. Where it is in doubt, as to whether an injured plaintiff, in an action against an interstate railway company, was in the employment of the defendant in interstate commerce, at the time of his injury, is a question of fact that should be submitted to a jury.

This Court said in the case of N. C. R. Co. v. Zachary, 232 U. S. 248, 58 L. Ed. 591:

> "Where, upon the evidence, any essential matter bearing on the question of whether an employee of a railroad company was, at the time of the injury, engaged in interstate commerce is in doubt, it should be submitted to the jury under proper instructions." See also Seaboard etc. R. Co. v. Moore 228 U. S. 434, 57 L. Ed. 907.

The defendant offered no evidence whatever to sustain its special plea, or, of its defense that Bryant was in its employment in interstate commerce at the time he was shot. The only witness in fact of defendant that was interrogated about Bryant's employment, at the time of the shooting, was Mr. L. E. Crance, Supervisor of tracks, who said, R. 141, that he had directed defendant's foreman, Dodson, to discharge Bryant on the Saturday before the shooting—two days before the tragedy happened.

The whole reliance of learned counsel for petitioner to bring this case under the Federal Statute is that, immediately, after Bryant had been discharged from the defendant's service, that he was shot by defendant's foreman, and that Bryant not having been given a reasonable time to leave the defendant's premises, that the Federal Statute applies. It is said in Mr. Perry's brief for petitioner, p. 18: "That the intestate was wounded by petitioner's foreman immediately after being discharged."

The theory of learned counsel on the other side is that Bryant's employment extended after he had been discharged until he had been given a reasonable time to leave the work and employment. No authority, however, has been referred to to show that the employment of a servant is extended for the benefit of the master after the servant has been discharged. Authorities are referred to by petitioner's attorney showing that the Federal Statute extends to servants going to and leaving their work. This, however, is implied from the contract of service. Here, however, the relation of master and servant had been ended and Bryant had become a mere licensee to leave the employment, and if he refusd to leave he became a trespasser.

We, however, challenge the learned attorney for petitioner to point out a scintilla of evidence in this case showing that the discharge and the shooting occurred close together. Defendant's foreman, Dodson, who did the shooting, said, R. 84-5, that Bryant **"was discharged on Saturday"**; and that

the shooting occurred **"on the following Monday morning."** And Dodson said that he discharged Bryant with the approval of Mr. Crance, Supervisor of tracks. Dodson was asked, R. 86: "Do I understand you to say that you discharged him (Bryant) then with the full approval of Mr. Crance?" and he answered, **"Yes, sir"**; and Mr. Crance said in his examination in chief and as a witness for the defendant, R. 141, that he directed Dodson to discharge Bryant on Saturday, two days before the shooting. That Bryant was discharged on Saturday is borne out by the circumstance that shortly after the section force had stopped work on Saturday, August 29, 1925, the whole section force, **except Bryant,** was called out to do emergency work. There had been a wreck at Moss Run, near where Bryant lived, and the section force was called out to clear away the wreck, and the force worked on that wreck until two o'clock Saturday night. See the testimony of G. T. Wright, R. 38-39, showing that Bryant was not included among the section hands called to do the emergency work, R. 39, and see also the testimony of Samuel J. Wright, R. 44-45, and the testimony of Frank Wright, R. 56.

It is true that on Monday, the 31st day of August, 1925, two days after he had been discharged, Bryant went back on the section to work. When he got to the tool house, the section hands were there and about ready to start off on their hand-car to their point of work on the defendant's railroad. Long, the regular foreman, had not re-

turned, and Dodson was in charge. As soon as Bryant had come up Dodson reminded Bryant that he had been discharged the Saturday before and could not work, R. 93. Bryant started to go into the tool house to get his tools and Dodson said to him, **"I don't need you any longer. * * * You get away from here."** Testimony of G. T. Wright, R. 46. Frank Wright said, R. 57: "When he (Bryant) stepped up into the tool house I heard Dodson say to Bryant, **'I ain't got anything more for you to do'**; and said, R. 58: "When Dodson told him that, Bryant, he just walked on to the tool house and got his pick and walked on out to the car and put it on the car." Taylor C. Thompson, R. 67, said "they were getting ready to get on the car and he, Dodson, said: **'I told you (Bryant) I wouldn't work you any longer. * * * Bryant, I told you to get off the job. You get away from here."** W. M. McDowell said "he (Bryan) picked up his dinner bucket and put it on the lever car and Dodson said to him, **"I told you that I wasn't going to work you any more, * * * just get on up the road, * * * well I done told you to just get up on the road, I ain't going to work you."** When the tragedy happened Dodson was standing at one end of the lever car and Bryant at the other end of the car, R. 47, and Dodson said to Bryant, **"fellow, I have just fooled with you long enough; you get away from here."** G. T. Wright's testimony, R. 46. Bryant was standing with his hands down and his gloves on without any weapon, but refused to leave in the

"face" of the gun that Dodson drew and pointed at him and Dodson began to shoot.

The uncontradicted evidence shows that Bryant was discharged on Saturday, two days before the shooting; that he was treated as discharged from the service on the following night and Sunday, when every member of the section force was called out, except Bryant, to do emergency work as referred to supra; and as soon as Bryant appeared on the following Monday morning to go to work he was told by Dodson that he had been discharged on Saturday, and that he must get away. .The State Courts found no difficulty in concluding that Bryant had been discharged on Saturday. The Virginia Courts could have found no other way, for there is no evidence in the record to warrant any other finding.

We here refer the Court to the case of Northwestern Union Packet Co. v. McCue's Admrx. 84 U. S. 508, which is fully quoted from and considered in our brief opposing writ of certiorari 8-9-10-11.

In the case of Pennsylvania Co. v. Marion Donat 239 U. S. 49, 60 L. Ed. 139, the trial court refused to charge the jury that Donat was not engaged in interstate commerce when he was injured and therefore could not recover, and submitted this question to the jury. This action of the trial court was approved by the Circuit Court of Appeals and this Court said that such approval "was clearly right." See our brief opposing writ of certorari 6

and 7, where the Donat case, supra, is considered and freely quoted from.

Conclusion.

We respectfully submit, that the contention by the defendant that the Federal Employers Liability Act applies to this case is without foundation and, frivolous, and that the motion of respondent ought to be sustained.

Respectfully submitted,

CHARLES CURRY,
Attorney for R. L. Bryant, Administrator of the Estate of M. L. Bryant, Deceased.

R. B. STEPHENSON and
CURRY CARTER, of Attorneys.

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CHARLES ELMO

Supreme Court of the United States

OCTOBER TERM, 1929

No. 113

THE CHESAPEAKE & OHIO RAILWAY COMPANY, Petitioner,

v.

R. L. BRYANT, Administrator of M. L. Bryant, Deceased, Respondent.

REPLY BRIEF OF RESPONDENT'S ATTORNEY UPON HIS MOTION TO DISMISS.

CHARLES CURRY,
For Respondent.

R. B. STEPHENSON,
CURRY CARTER,
Of Counsel.

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REPLY BRIEF OF RESPONDENT'S ATTORNEY UPON HIS MOTION TO DISMISS.

I.

The Erroneous Assumption of Defendant That the Evidence in the Record Showing That Bryant Was Discharged From Defendants Service, Two Days Before the Shooting, Cannot Be Considered on Account of Variance.

(The petitioner is referred to in this brief as the

defendant, the respondent as the plaintiff, and the deceased as Bryant.)

The defendant has presented its case upon the erroneous assumption that the evidence in the record, that Bryant was discharged on Saturday, two days before the shooting complained of, cannot be considered, because under the allegations of the declaration this evidence could not be admitted. This assumption of the defendant is without foundation under the settled practice in our State.

This case was founded on the testimony of the defendant's section employees. It was not known by the plaintiff, or, his attorneys, at the time this action was brought, that the defendant's foreman, Dodson, had discharged Bryan on Saturday, two days before the shooting occurred. This was developed by the testimony of Dodson taken in the form of a deposition, at the Virginia Penitentiary, shortly before the trial. There was no objection to the testimony of Dodson on account of variance, either at the time of the taking of the deposition, or at the trial. If such objection had been made, the plaintiff, or, the trial court, would have had an opportunity to act under the Virginia Statute, Section 6250 of Virginia Code, 1919, which provides as follows:

> "If, at the trial of any action or motion, there appears to be a variance between the evidence and allegations or recitals, the court, if it consider that substantial justice will be promoted and that the opposite

party cannot be prejudiced thereby, may allow the pleadings to be amended, on such terms as to the payment of costs or postponement of the trial, or both, as it may deem reasonable. Or, instead of the pleadings being amended, the court may direct the jury to find the facts, and, after such finding, if it consider the variance such as could not have prejudiced the opposite party, shall give judgment according to the right of the case."

There was never any objection made to the testimony of Dodson relating to Bryant's discharge on Saturday, nor was there any motion to strike out his testimony, on account of variance.

Dodson was asked (R. 84) "Q. Do you know whether Mr. Bryant had been discharged from the C. & O. service when he was mortally wounded." Then follows defendant's objections as follows: "By Mr. Perry; This question and any answer is objected to on the ground that the question is leading, that the witness is asked to state a conclusion of law, and that the witness' statement cannot bind the defendant in this case since they are made long after the occurrence."

"Overruled. Defendant excepts."

The witness answered: "Yes, sir."

Q "When was he discharged?
A He was discharged on Saturday.

BY MR. PERRY: Same objection.

Overruled.

Q On what day was the shooting?
A On Monday morning.
Q On the following Monday morning?
A Yes, sir, the following Monday morning.
Q Who discharged him from the C. & O. service?
A I did myself."

It will be observed that the record is a clean record as relating to bills of exceptions or certificates of exceptions.

It was never intimated at the trial that there was any objection to the evidence on account of variance.

In defendant's demurrer to the evidence it was required under the Virginia Statute, Section, 6117, set out in appendix to defendant's brief page, 22, to state specifically the grounds of demurrer relied on, and the grounds of demurrer to the evidence appear in the record, 160-161, and the Court will search in vain for any intimation or suggestion in the seven grounds of demurrer that a variance was relied on. More than this, defendant was required under our practice to state the errors that it relied on in its petition to the Supreme Court of Appeals

of Virginia for a writ of error, and it assigned only two grounds (R. 4-5):

> "The Circuit Court erred in overruling the defendant's demurrer to the evidence for the reasons:
>
> First. The defendant cannot be held liable under the Federal Employer's Liability Act, which applied here to the exclusion of any other statute or rule of law since the intestate's injury and death did not result from the negligence of any of the defendant's officers, agents, or employees.
>
> Second. Dodson, who shot the plaintiff's intestate, was not acting within the scope of his employment by the defendant, or in the prosecution of the defendant's work, in attacking and injuring the plaintiff's intestate."

It is obvious that if there was a variance, that it was waived by the defendant, and we feel that it is hardly fair for the defendant to present its case on the theory that evidence in the record that Bryant was discharged on Saturday, is out of the case, and cannot be considered.

It is said in Burks Pl. & Pr., (2d. Ed) Page 588 the standard authority on Common law pleading and practice in Virginia:

> "If, however, notwithstanding the variance, no objection was made to the admissibility of the evidence, and no motion was made to exclude on account of the supposed variance, the objection must be considered on appeal as waived."

It was said by the Supreme Court of Appeals of Virginia in the case of Conrad v. Ellison-Harvey Co. 120 Va. 455 at p. 462-463:

> "At no time during the progress of the trial was there, so far as the record shows, any intimation that the defendant relied upon a variance between the declaration and the proof, or upon the insufficiency or inaptness of the evidence to sustain a recovery upon the common counts. Parties are not permitted to make one objection to evidence in the trial court and another and different one in the appellate court, but are regarded as having waived all objections save those specifically pointed out ***. This statute, (Section 3384, Code 1887, now Section 6250, Code 1919), has always, and most properly, been regarded with favor, and construed with liberality by the courts of this State; and its terms would have fully met the condition now complained of by the defendant. Having failed to avail itself of the remedy thus provided, or to give the plaintiff or the

> court the opportunity to invoke it, the defendant cannot now take advantage of the irregularity which the statute would have cured. This conclusion is in accord with the well settled policy and repeated decisions of this Court." Citing numerous cases.

Defendant's counsel in cross examining Dodson assumed that Bryant had been discharged by Dodson on Saturday. Dodson was asked on cross examination (R. 88):

> "Q Whereabouts were you on the preceding Saturday when you discharged Bryant?
>
> A Right east of the tunnel."

And then defendant's counsel proceeded to examine Dodson about discharging Bryant on Saturday. The defendant called L. E. Crance as its witness, and in examining Mr. Crance it was assumed by defendant's counsel that Bryant had been discharged. He was asked (R. 138):

> "Q How was Bryant employed before he was discharged; what did he do, or what did he work at?
>
> A As a track laborer."

And (R. 144) defendant's counsel brought out from Mr. Crance on examination in chief that he had directed Dodson to discharge Bryant on Saturday before the shooting.

The Virginia Court held in C. & O. Ry. Co. v. McCarthy 114 Va. 181, that:

> "An objection to admissibility of evidence is not available to one who has himself elicited the same facts in the cause."

And the Virginia Court said in the N. & W. Ry. Co. V. Simmons 127 Va. 419 at p. 423:

> "If material, substantially the same evidence would have remained in the record, even if this which is objected to had been stricken out, for the companies attorney cross examined the witness, Vass, fully as to this very conversation, and elicited in such cross examination the identical evidence to which this exception relates."

And said quoting from the McCarthy case supra:

> "This court has repeatedly held that no objection to the admissibility of the evidence is available to one who has himself elicited the same facts in the cause." Citing cases.

A variance cannot be taken advantage of unless it is material. It is said in Burks Pl. & Pr. (2d Ed.) p. 586:

> "The variance* between the allegation and the proof must be in a material matter."

It is avered in the declaration that Bryant was shot after he had been discharged by the defendant's section foreman Dodson. This was certainly such averment as would put the defendant on notice that its relation to Bryant as employer and employee had terminated at the time of the shooting. Could therefore the variance between the allegation and the proof mislead the defendant in maintaining its defense? The evidence shows that it knew at the time of the shooting that Bryant had been discharged on Saturday, and how could it be prejudiced.

This court said in the case of Nash v. Towne 72 U. S. 704, 18 L. Ed. 527:

> "Undoubtedly, the rule is that the proofs must correspond with the allegament in that behalf is fulfilled, if the subtions in the declaration, but the requirestance of the declaration is proved * * * *.
>
> Recent statutes in the states also confer a liberal discretion upon courts in allowing amendments to pleadings, and those statutes, together with the change they have super-induced in the course of judicial decisions, may be said to have established the general rule in the state tri-

> bunals that no variance between the allegations of a pleading and the proofs offered to sustain it, shall be deemed material, unless it be of a character to mislead the opposite party in maintaining his action or defense on the merits. * * * Irrespective of those statutes, however, no variance ought ever to be regarded as material where the allegation and proof substantially correspond."

It was said by this Court in the case of Standard Oil Co. v. Brown 218 U. S. 77, 54 L. Ed. 934:

> "The rule is familiar and elimentary that the pleadings and proof must correspond, but a rigid exactitude is not required," And the holding in the Nash case supra was approved, and this Court further said in the case Standard Oil Co. v. Brown supra. "In the case at bar the company could not have been misled. It made no objection to the testimony of the plaintiff. It replied to it by testimony of like kind. It did not indicate in what way the proof varied from the pleadings, nor move for a continuance. Moreover, we think the pleadings, though inartifically drawn, were sufficient to notify the company that one of the grounds of action was its omission of duty to inform those whose employment made it necessary to be in the

> stable, of the danger to them of the use to which the hole was put."

In the instant case the defendant was familiar with all the facts in the case. All the witnesses were its employees. It had directed through its superintendent of tracks, Mr. Crance, to discharge Bryant on Saturday, and Dodson the defendant's section foreman said that he had discharged Bryant on Saturday two days before the shooting under the direction of Mr. Crance. And can the defendant with any fairness, or, sincerity, claim that Bryant was shot immediately after he was discharged, or, that he was not discharged until Monday morning, the day of the shooting?

It is said in defendant's brief P. 8:

> "And a demurrer to the evidence does not waive an objection to legal or incompetent evidence admitted over the demurrants motion to exclude." Citing N. & W. Ry. Co. v. Warden 117 Va. 801-804.

This Warden case supra, has no application whatever to the case at bar. In that case there was a material variance. An entirely different case was shown by the evidence from the case stated in the declaration. At the end of the trial there was a motion to strike out the evidence, and the motion was overruled. After the motion to strike out was overruled, the defendant demurred to the evidence, and was overruled. It was in substance averred in the

declaration that the plaintiff was under the influence of drink, and that the defendant's agents knowing his condition wrongfully, forcibly and negligently ejected him from the train in the dark, and threw him to the ground and dislocated one of his hips, and left him in a dangerous place. "Upon the trial the evidence introduced failed utterly to show that the plaintiff was thrown from the train and hereby injured, but it did tend to show that he was negligently left in an unsafe place and, as a proximate result, wandered about in the dark until he fell from a trestle and sustained the injuries of which he complains." The defendant moved to strike out all the evidence relative to the plaintiff being ejected from the train at an unsafe place because there was no allegation in the declaration to support it, and when the court overruled the motion to strike out this evidence, the defendant excepted and embodied it in its bill of exception No. 2. This was the only way that the exception could be made part of the record; and it is folly to claim the contrary. In the case at bar there was an objection, as above pointed out, but the objection was not on account of variance between Dodson's testimony and the allegation in the declaration, but upon entirely different grounds; and there was no bill of exception, or, certificate of exception, nor, was there any motion made to strike out the testimony. The mere noting of an objection to a question, and the overruling of the objection appearing in the notes of the evidence is not sufficient. As said in Burk's Pl & Pr. (2d. Ed.) 507:

> "The noting at intervals in stenographic notes that objections to questions were made and overruled, and exceptions taken, is not sufficient. There must be a bill or certificate of exception signed by the Judge."

We believe that it is self evident and conclusive that defendant's counsel did not believe that there was a material variance between the allegations and proof, or, he would have objected to the evidenct on account of variance, or, would have moved to strike it out, and would have made his objection a part of the record by bill, or certificate of exception. Defendant's counsel is like the squirrel that jumped from tree to tree, and from limb to limb, and finally tried to hang on to a twig with his eyelids.

II.

Did the State Courts Make Any Finding of Facts?

Defendant's counsel in his brief, page 10, claims that no such finding was made.

It has been admitted by the plaintiff throughout this case that the defendant is, and was, a common carrier by railroad engaged in commerce between the states; but it was, and is, specially denied that Bryant was in the defendant's employment in interstate commerce at the time he was shot. This was a clear cut issue of fact to be determined by

the jury, or by the court on a demurrer to the evidence. Here that issue had to be determined by the court on the evidence. The court found that Bryant was not in the employment of the defendant at the time he was shot, but had been discharged from the service two days before the shooting. Is it not perfectly clear that there is evidence in the record to sustain this finding? Could the court on the evidence have found any other way? Can it be pretended that the evidence is such that the jury could not have found for the plaintiff on this issue? If there is evidence, however, in the record upon which the jury could have found for the plaintiff, then upon a demurrer to the evidence the court was bound to so find. The Virginia Court said in the case of Addington v. Guests River C. Co. 130 Va. 584 at page 604:

> "The rule of consideration on demurrer to the evidence is succinctly stated in Milton v. N. & W. Ry. Co., 108 Va. 763, 62 S. E. 961: "If upon demurrer to the evidence, the evidence is such that the jury might have found a verdict for demurree, the court must so find, and give judgment in his favor, and further, if reasonably fair-minded men might differ upon a question, such a question must be decided against demurrant."

III.

Can It Be Pretended That This Court Has Jurisdiction to Dispose of This Action Unless Bryand at the Time He Was Shot Was in the Employment of the Defendant?

Can it be claimed here that there is no evidence in the record to sustain the finding of the State courts, that Bryant was not in the employment of the defendant at the time of the tragedy complained of? We have already poined out to the court in our opening brief, and, in this brief that there is ample evidence in the record to sustain the finding of the state courts. In fact there is no evidence to the contrary. The jury would have been bound to find on the evidence just as the courts found on the demurrer to the evidence, that Bryant was not in the employment of the defendant in interstate commerce at the time of the shooting. It can hardly be claimed by the defendant with any assurance that there is here a conclusion of law as to a Federal right and that the finding of facts are so intermingled as to make it necessary in order to pass on the Federal question to analyze the facts. There can be no Federal right involved in this case unless Bryant was in the defendants employment when the right of action accrued, and that was a question of fact to be determined by a jury or by the courts on the demurrer to the evidence.

It is sought by the defendant, erroneously, however, as we have pointed out, supra, to bring this

case under the Federal Statute by disregarding altogether the evidence showing that the discharge of Bryant occured two days before the shooting. It is so well settled, that it is useless, to cite other authorities to show that the question of Bryant's employment was a question to be determined by a jury; and here the defendant preferred to submit that question to the court on its demurrer to the evidence, and it is bound by the finding of the state courts.

IV.

The Claim of the Defendant That "The Ground Upon Which Respondent Asserts That the Judgment of the State Court Was Based, is in Substance and Effect the Decision of the Federal Right Claimed by the Petitioner."

The language petitioner's counsel uses is to us ambiguous and beclouded. The object seems, however, to be to inject into this hearing, on the plaintiff's motion to dismiss, the question as to whether or not Bryant was a trespasser. That, however, is not a question now to be determined, or as we take it, even to be considered, but as defendant's counsel states with much confidence that the uncontradicted evidence shows that the foreman Dodson had no authority to expell trespassers or to police the tracks, we will refer to it. Dodson, as shown by Mr. Crance, defendant's witness and supervisor of tracks, had authority "to look after the

companies property in general," among other duties (R. 141), and Dodson certainly had implied power to eject any agent, who might disturb defendant's section force.

This case was first decided by the full State Court, all five Judges sitting. The opinion handed down was by Judge Burks, who shortly after that, became seriously ill and died about four months later. Judge Burks was succeeded by Judge Holt, who was disqualified to sit in this case, and at the re-hearing the case was heard and disposed of by four Judges. The opinion by Judge Burks is criticised with some severity by defendant's counsel. Judge Burks was the author of Burks Pleading and Practice and other law writings, and was universally recognized as the most learned Judge and Jurist of Virginia; and we submit that no fault can be found with the reasoning and conclusion in his opinion.

It is true that the judgment of the state court of January 19, 1928, supported by the opinion of Judge Burks, was set aside and this case re-heard, but it was affirmed, although by a divided court, and it is also true that the opinion has not been officially reported, nor has it been printed in any unofficial reporter, but there is no reason why it does not stand for and show the reasoning and grounds upon which the final judgment of the state court was reached.

Defendant's counsel in his brief, page 14, quotes thus from the opinion of Judge Burks:

> "When Bryant went to the tool house on Monday morning he did not go there as a trespasser. He did not consider the discharge on Saturday as final, and on his way there said that he expected Dodson would discharge him * * * Under these circumstances Bryant can not be said to have been a trespasser in coming to the tool house, but he became such when informed of his prior dismissal and refused to leave." R. 170-1.

After making the quotation counsel for the defendant says at the bottom of page 14 of his brief: "The purpose of this reasoning was to avoid the application of the Federal Employers Liability Act." This is hardly fair, and tends to reflect on the great old Judge whose memory is sacred to all scholars and students of the law.

Bryant for years had been in the service of the defendant as a section laborer, and had been a good and faithful servant. See the testimony of Mr. Long the defendant's regular foreman (R. 159). Long had hired Bryant and had been Bryant's regular foreman ever since he had been employed by the defendant. Bryant evidently liked the service, and was loth to lave it. He was a poor laborer; had a wife and two small children to support, and he lived near his place of work. It was a desolate mountain district, where there was no place of employment near, except railroad work, and Bryant had his wife and children pulling at his coat tail

for bread. He knew that Dodson was only acting as temporary foreman, and after he was discharged on Saturday, Bryant no doubt hoped that Long would be in charge on the following Monday, and thinking this went back and offered to work. In going there he stood in the relation of one offering to hire, and his relationship to the defendant was as invitee or as a licensee. Long was not in charge on Monday morning but Dodson was, and as soon as Bryant appeared, he was reminded by Dodson that he had been discharged on the Saturday before and to get away, and Bryant did not become a trespasser until he refused to leave. As said by Judge Burks in the part of his opinion omitted in the quotation in the defendant's brief above referred to and quoted, "Dodson was only a temporary foreman and when he ordered Bryant off, the latter inquired for Long, the permanent foreman who had employed him, and informed by Dodson that Long was at home he said. I will go over and see him. He hired me, and if he wants to fire me, he can fire me." (R. 170). The fact that Bryant came back Monday morning after being discharged on Saturday and offered to work did not create the relation of Master and Servant between the defendant and Bryant, unless his services were accepted by the defendant, but his services were not accepted, and there was no mutuality between the defendant and Bryant. There is a mutuality of right between an employer and an employee in the extinguishment of the contract of employment.

> "The employer enjoys the absolute right of dismissing his employees without cause * * *, and the employee is on a plain with the employer in this respect. Every workman may quit the service of his employer at will." 18 R. C. L. 510 Sec. 21.

When Bryant came back to offer to work Monday morning he had no rights as an employee of the defendant. That relation had been severed and ended the Saturday before. When he was told to leave, his right to a rasonable time to leave was not incident to his employment, for that had been ended two days before, and the defendant is estopped to claim that Bryant was entitled to reasonable time to leave its premises as incident to his employment. It cannot be heard to make such claim to avoid liability.

The theory of the defendant's counsel, is that if Bryant was not a trespasser, then he was an employee, and that as the court found that he was not a trespasser, that then he must have been an employee of the defendant under the Federal Act, and that as incident to his employment was entitled to a reasonable time to leave the defendants premises after he had been discharged. Is it not obvious from the evidence in this case that this is a strained Monday morning and offered to work, Dodson had and impractical view? When Bryant came back on the lawful right to require Bryant to leave. Dodson was in full charge of the defendant's work, and one of his duties as said by Mr. Crance was

"to look after the companies property in general."

> "One who is lawfully in charge of premises, and has required another to leave whom he has the right to require, may lawfully use so much force as is necessary to remove such other." 3 Cyc. 145, 5 C. J. Sec. 233 p. 745, Montgomery's case 98 Va. 840.

V.

Did the Defendant Admit That Bryant Was Not in Its Employment When the Shooting Occurred?

Defendant's counsel in his brief page 18-19 admits that in the defendant's demurrer to the evidence it is stated that Bryant was discharged before he was shot; and in the fourth ground of the demurrer to the evidence, it is specifically stated (R. 160) "That the plaintiff's intestate was discharged from the defendant's employment on Saturday prior to the Monday of the shooting complained of;" and in the defendant's seventh ground of demurrer (R. 161), it is stated "that the shooting of said intestate by said Dodson was entirely separated in point of time and occasion from said intestate's discharge from the defendant's employment. These statements are inconsistent with the theory that Bryant was in the employment of the defendant at the time of the shooting, but defendant's counsel undertakes to justify these inconsist-

ent statements under Section 6107 of the Code of Virginia, 1919, which provides that, "the defendant in any action may plead as many several matters, whether of law or fact, as he shall think necessary, and he may file pleas in Bar at the same time with pleas in abatement, or within a reasonable time thereafter."

At common law the defendant was allowed to plead but one matter of law or fact; he could demurrer or plead, but he could not do both. Our Statute to remedy this followed the English Statute, and the English courts refused to allow inconsistent pleas to be filed, but our Courts, it is true, have held, and it is settled in our state, that inconsistent pleas are allowable, but it is well settled that this only applies to the defendant's pleas to the declaration, and does not apply to any subsequent pleading. It is said in Burks Pleading and Practice (2d. Ed.), 325:

> "It will be observed that the Virginia Statute, like the English Statute, uses the word 'plead' in a technical sense, and hence it applies only to the defendants answer to the plaintiffs declaration, and does not apply to the replication, rejoinder, or any subsequent pleading; as to the replication, rejoinders, and all subsequent pleadings, the common law rule prevails in Virginia, and the pleader can make but one answer, whether of law or fact, to the antecedent pleading. He may demur or he may answer in fact, but he cannot do both."

The Virginia Court said in C. & O. Ry Co. v. American Exchange Bank 92 Va. 495 at p. 498:

> "But as to subsequent stages of the pleading, there has been no change in the common law. The plaintiff can make one answer, either of law or of fact, but no more, to each plea." Citing Lang v. Lewis 1 Ran. (Va.) 277, and 4 Minors Inst. 166-7 3rd. Ed.

We submit that it is clear and obvious that Section 6107 of the Code of Virginia, 1919, has no application whatever to the grounds stated in a demurrer to the evidence. Moreover it was not necessary for the defendant to state in its grounds of demurrer that Bryant had been discharged "on Saturday prior to the Monday of the shooting," or that the shooting was entirely separate in point of time from Bryant's discharge. These statements were made because the evidence clearly shows that these statements are correct. Defendant's counsel has apparently taken the position throughout this case that because he pleaded facts that bring the case under the Federal Statute that this is sufficient to bring this case under the Federal Employers Liability Act although there is no evidence to sustain the plea. On this theory any case could be brought by a defendant within the jurisdiction of the United States Courts. It is very clear, however, that the mere averment of facts cannot give the United States Courts jurisdiction unless sustained by the

evidence. As said by his Court in the case of Sawyer v. Piper 189 U. S. 157, "that the mere averment of such a question is not sufficient."

VI.

Conclusion.

We respectfully submit that this case does not come under the perview of the Federal Employers Liability Act, and that this Court has no jurisdiction, and that the plaintiff's motion ought to be susained.

Respectfully submitted,

CHARLES CURRY,
For Respondent, R. L. Bryant, Administrator of the Estate of M. L. Bryant, Deceased.

R. B. STEPHENSON and
CURRY CARTER, of Counsel.

FILE COPY

DEC 30

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 113

THE CHESAPEAKE & OHIO RAILWAY COMPANY, Petitioner,

v.

R. L. BRYANT, Administrator of M. L. Bryant, Deceased, Respondent.

REPLY BRIEF OF RESPONDENT'S ATTORNEY TO PETITIONER'S BRIEF ON THE MERITS OF THE CASE.

CHARLES CURRY,
For Respondent.

R. B. STEPHENSON,
CURRY CARTER,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 113

THE CHESAPEAKE & OHIO RAILWAY COMPANY, Petitioner,

v.

R. L. BRYANT, Administrator of M. L. Bryant, Deceased, Respondent.

REPLY BRIEF OF RESPONDENT'S ATTORNEY TO PETITIONER'S BRIEF ON THE MERITS OF THE CASE.

I.

Learned Counsel for the Defendant, in His Statement of the Evidence, Does Not Seem to Appreciate, That This Case Stands on Defendant's Demurrer to the Evidence.

(The petitioner is referred to in this brief as the defendant, the respondent as the plaintiff, and the deceased as Bryant.)

Counsel for the defendant, when stating the evidence relating to Bryant's discharge from defendant's employment, in the petition, and, in his briefs, appears to have lost sight of the fact that this case stands on the defendant's demurrer to the evidence. He has presented the evidence in the most favorable light for the defendant, and as if the defendant were the demurree, instead of the demurrant.

The familiar law applicable to demurrers to the evidence is stated in the case of Duncan v. Carson, 127 Va., p. 319-320 thus:

> "On a demurrer to the evidence, the demurrant is considered as admitting the truth of all his adversary's evidence and all just inferences that can be properly drawn therefrom by the jury, and as waiving all his own evidence which conflicts with that of his adversary or which has been impeached, **and all inferences from his own evidence** (although not in conflict with his adversary's) which do not NECESSARILY result therefrom. This admission **embraces the credibility of the demurree's witnesses and the existence of all facts which demurree's evidence (which includes testimony) conduces to prove,** or which may be reasonably **inferred** from his whole evidence, direct and

> circumstantial; and, if several inferences may be drawn from that evidence, differing in degrees of probability, **the court must adopt those most favorable to the demurree,** provided they be not forced, strained, or manifestly repugnant to reason." (Italics supplied.)

Defendant's counsel has disregarded altogether the testimony of Dodson, defendant's section foreman, and the testimony of defendant's witness, Mr. Crance, **that Bryant was discharged on Saturday, two days before the shooting complained of** (R. 84-85 & 141); and see the opinion of Judge Burks (R. 165-166).

The Court under the demurrer to the evidence was required to take the view of the evidence **most favorable to the plaintiff,** and the defendant cannot be heard to question the **credibility of plaintiff's witnesses, or, the facts that defendant's evidence tends to show.**

The defendant elected to submit the question as to whether Bryant was in the employment of the defendant, at the time of the shooting, to the court, on its demurrer to the evidence. The court was therefore bound to take the view of the evidence most favorable to the plaintiff. It cannot be denied that there is evidence upon which a jury might have found that Bryant was not in the employment of the defendant, and had been discharged two days before he was shot, and the court was bound to so find, and did so find.

As said by the Virginia Court in the case of Addington v. Guest River Coal Co., 130 Va. 584-604:

> "The rule of consideration on demurrer to the evidence is succinctly stated in Milton v. N. & W. Ry. Co., 108 Va. 763, 62 S. E. 961: 'If upon demurrer to the evidence, **the evidence is such that the jury might have found a verdict for demurree, the court must so find,** and give judgment in his favor, and further, **if reasonably fair-minded men might differ upon a question,** such a question must be decided against demurrant."

If the question of fact, as to whether or not Bryant had been discharged on the Saturday before he was shot, had been submitted to a jury, and the jury had found as the court has found on the demurrer to the evidence, could any one plausibly contend in this court that the finding of the jury was not final on the evidence, as it appears in the record? The defendant preferred to submit that question to the courts, and is not the finding made by the state courts final, and conclusive, as against the defendant? See Dower v. Richards, 151 U. S., 658, and cases cited in our brief opposing writ of certiorari, p. 3.

The evidence shows clearly that Bryant had been discharged from the defendant's employment two days before the tragedy; **and if there is any**

evidence in the record to the contrary, it was waived by the defendant; and as the case stands on its demurrer to the evidence, there is not a **scintilla** of evidence that brings this case under the Federal Act, and the statements of facts in defendant's petition and in the briefs of its counsel **are entirely misleading.**

As said by Horace, **"Decipimur specie recti."**

II.

Erroneous View of the Law Taken by Defendant's Counsel.

Defendant's counsel, from the beginning of this case, has, apparently, proceeded upon the theory that by mere pleading facts, as by defendant's special plea, R. 22, that bring this case under the purview of the Federal Employers' Liability Act, is sufficient to give Federal Courts jurisdiction under that statute. If that is true, any case for personal injury against an **intrastate** railroad might be brought under the jurisdiction of the Federal Courts. A case cannot ordinarily be brought under the scope of the Federal Employers' Liability Act, by mere averments. To give this court jurisdiction under that act, the burden was on the defendant to show: first, that it was a common carrier by railroad, engaged in commerce between the states; and, second, that Bryant, at the time he was shot, was in the employment of defendant, in such commerce. N. C. R. Co. v. Zachary, 232 U. S. 256, 58 L. Ed. 594.

It was admitted in the beginning, by the plaintiff, that the defendant was a common carrier by railroad, engaged in commerce between the states, but the plaintiff denied that Bryant, at the time he was shot, was in the employment of the defendant, in interstate commerce, and this issue was pointedly made by the pleadings, R. 22, 24, that we have referred to in our opening brief on motion to dismiss, pp. 8 and 9. It will be seen from the record, that the defendant made no effort to elicit evidence from its witnesses to support its special plea, and in fact, showed by its witness, Mr. Crance (R. 141), that he had directed Dodson to discharge Bryant on Saturday, two days before the shooting occurred. That the defendant relied alone on its plea to bring this case under the Federal Statute is obvious, as we believe from the admissions that it made in its demurrer to the evidence (R. 160-161), that Bryant had been discharged **"from the defendant's employment on Saturday, prior to the Monday, of the shooting complained of, and not on said Monday,"** and that the shooting of Bryant by Dodson **"was entirely separated in point of time, and occasion, from Bryant's discharge from the defendant's employment."** Is it not inconceivable that the defendant would have made these admissions, which in themselves plainly admit that the Federal Act does not apply, unless it was believed that merely pleading the act is sufficient to bring this case under its operation. See our reply brief on motion to dismiss, p. 21 et seq.

Defendant appears to rely on mere averments without substantial foundation for jurisdiction.

Our contention has been, and now is, that it appears from the record that no real Federal question is involved. Such question certainly cannot exist in this case unless Bryant was in defendant's employment at the time of the tragedy. The evidence shows that he was not in its employment, and the state courts have so found, and on the defendant's demurrer to the evidence, could have made no other finding. If this is true, the Federal Statute has no application, and this court has no jurisdiction except under the Federal Act. We fully appreciate, however, that this court is the ultimate and supreme arbiter of its own jurisdiction.

It was said by this Court in Sawyer v. Piper, 189 U. S. 157, 47 L. Ed. 759:

> "A real, and not a fictitious, Federal question is essential to the jurisdiction of this court over the judgments of state courts. Millinger v. Hartupee, 6 Wall. 258, 18 L. Ed. 829; New Orleans v. New Orleans Waterworks Co. 142 U. S. 79, 87, 35 L. Ed. 943, 946, 12 Sup. Ct. Rep. 142, 145. In the latter case it was said that 'the bare averment of a Federal question is not in all cases sufficient. It must not be wholly without foundation. There must be at least color of ground for such averment; otherwise a Federal question might be set up in almost any case, and the jurisdiction of this court invoked simply for the purpose of delay." And see Wabash R. Co. v. Hayes, 234 U. S. 90, 58 L. Ed. 1230.

III.

The Statements of Counsel Relating to When Bryant Was Discharged Are Misleading, and Not According to the Evidence in the Record.

It is admitted by defendant's counsel, that Bryant had been discharged from defendant's service before he was shot, but the evidence of Dodson and Crance are entirely ignored, and a strenuous effort is made to show from the evidence, that Bryant was not discharged until Monday morning, and very shortly before he was shot, and that he was shot before he had a reasonable time to leave the defendant's premises, and that therefore, the Federal Statute applied until Bryant had reasonable opportunity to leave. This is an ingenious effort of defendant's counsel to bring this case under purview of the Federal Statute, that was not thought of, or intimated at the trial, and is not mentioned in its statement of defense, R. 25, nor in any one of its grounds of demurrer to the evidence, and should be given no consideration. Our Virginia Statute, Code 1919, Section 6117 provides as follows:

> "The party tendering a demurrer to the evidence shall state in writing specifically the grounds of demurrer relied on, . . . nor shall any ground of demurrer not thus specifically stated, be considered . . . ."

The provisions of the statute are mandatory, and it can hardly be pretended that defendant's fifth ground of demurrer (R. 161), is sufficient to enable it to rely on its claim here, that Bryant, though discharged from defendant's service, was still under the limitations and provisions of the Federal Statute until he had had a reasonable time to leave defendant's premises, and was shot by defendant's foreman before that reasonable time had elapsed.

It is true that in the plaintiff's declaration, it is averred in substance, that Bryant, when he began his day's work for the defendant, as its servant, on the morning of August 31, 1925, was discharged by defendant's foreman from its employment, and that Bryant did not, after he had been discharged, leave the defendant's premises, immediately, or, made some excuse for not leaving, and was shot by the defendant's forman (R. 19 et seq).

The shooting complained of happened in the presence of defendant's section force, and neither the plaintiff nor his attorneys had any intimation, at the time of the filing of the declaration, that Bryant had been discharged from defendant's service, on the Saturday before August 29, 1925. This evidence was not known until it developed in the testimony of defendant's foreman, Dodson, when his deposition was taken at the Virginia prison, in Richmond, shortly before the trial.

Defendant's attorney has presented this case upon the theory that the plaintiff is confined strictly to is allegations in the declaraion, with reference to the time when Bryant was discharged, and has

quoted the testimony of a number of witnesses for the plaintiff tending to support the allegations in the declaration, that the shooting followed closely after the discharge. The testimony of defendant's own witness, Mr. Crance, is entirely ignored. He said in chief (R. 141):

> **"I said to (Dodson) tell him (Bryant) to leave and draw his money; I don't want him (Bryant) any longer, if he don't want to work."**
>
> **Q "That was on Saturday afternoon?"**
>
> **A "Yes, sir."**

Then immediately followed the cross examination of Mr. Crance, and the first question on cross examination was:

> **Q "You, in fact, discharged him (Bryant), or directed his discharge?"**
>
> **And Mr. Crance answered, "Yes, sir, I directed it."**

The inference from this testimony of the defendant's witness, on the demurrer to the evidence, is that Dodson did what he was directed to do by his superior, and discharged Bryant, on Saturday, before the shooting. Dodson in his testimony shows that he did just what he had been directed to do by his superior, Mr. Crance, and discharged Bryant, on Saturday. He was asked (R. 84):

Q "Do you know whether Mr. Bryant had been discharged from the C. & O. service when he was mortally wounded?"

Defendant's counsel objected to the question as follows:

BY MR. PERRY: "This question, and any answer, is objected to, on the ground that the question is leading; that the witness is asked to state a conclusion of law, and that the witness' statement cannot bind the defendant in this case, since they are made long after the occurrence."

Overruled. Defendant excepts.

A "Yes, sir."
Q "When was he discharged?"
A "He was discharged on Saturday."

BY MR. PERRY: "Same objection."

Overruled.

Q "On what day was the shooting?"
A "On Monday morning."
Q "On the following Monday morning?"
A "Yes, sir, the following Monday morning."

Q "Who discharged him from the C. & O. service?"
A "I did myself."

It is claimed by defendant's counsel, in his statement of facts, that the evidence of Dodson, was evidence that was not admissible under the declaration, on the ground of variance, and therefore, cannot be considered, and ought not to have been considered by the state courts. Remarkable to say, it is contended by defendant's counsel, that upon defendant's objections quoted above, that Dodson's testimony as to the discharge of Bryant on Saturday should be disregarded, on account of variance. It can hardly be pretended that the objections and exceptions made by the defendant, can be given any consideration. In order to give such objections, life and effect, they must have been embodied in a bill, or certificate of exception, signed by the trial Judge. See our reply brief on motion to dismiss, p. 13. The objections, however, are not made upon the ground of variance. The question of variance is not mentioned. The objections are: (1) **that the question is leading,** (2) **that the witness is asked to state a conclusion of law,** (3) **and that the witness' statements cannot bind the defendant in this case since they were made long after the occurrence.** If these objections had been properly embodied in the record, could they be considered of any merit? They are not founded on variance from the allegations of the declaration. Are they not, in fact, frivolous?

It is not pretended by defendant, that any motion was made by it to strike out the testimony of Dodson on account of variance. Its sole reliance for rejecting Dodson's testimony, as to the time of discharge of Bryant, is founded upon its above loose objections merely noted in the stenographer's copy of the evidence.

If defendant had made proper objections to Dodson's testimony on account of variance, such objections could hardly be sustained. Variance must be material and substantial. It is where one case is alleged and another is proven. Can it be claimed that that is true here? There is certainly no material variance as to the character, or merits of the case. The alleged variance only relates to a question of time. It is not alleged by the plaintiff that the shooting was done until after Bryant had been discharged from the defendant's employment. The testimony of Dodson only shows that the interval of time between the discharge, and the shooting is longer than the time mentioned in the declaration. This does not make, or tend to make, a different case on the merits. But if it did, **there was no objection to it, and no motion to strike it out, and it stands here in the record just as if it had been alleged in the declaration.** If objection had been made on account of variance, the plaintiff or the trial court would have had an opportunity to avail themselves of the Virginia Statute, 6250, of Va. Code, 1919, relating to variance, which provides as follows:

> "If, at the trial of any action or motion, there appears to be a variance between the evidence and allegations or recitals, the court, if it consider that substantial justice will be promoted and that the opposite party cannot be prejudiced thereby, may allow the pleadings to be amended, on such terms as to the payment of costs or postponement of the trial, or both, as it may deem reasonable. **Or, instead of the pleadings being amended, the court may direct the jury to find the facts, and, after such finding, if it consider the variance such as could not have prejudiced the opposite party, shall give judgment according to the right of the case.**" (Italics supplied.)

If an objection on account of variance had even been made, after all the evidence was in, the court in this case could, and should have given judgment on the facts proven, without any amendment under the terms of the statute.

If there was a variance, as claimed by the defendant, it was waived by the defendant.

As said by the Virginia Court in Conrad v. Ellison-Harvey Co., 120 Va., at p. 462:

> "Parties are not permitted to make one objection in the trial Court, and a different one in the appellate Court, but are regarded as having waived all objections, save those specially pointed out."

And as said in Burks Pl. & Pr. (2d Ed.) p. 588, the leading authority on common law practice in Virginia:

> "If, however, notwithstanding the variance, no objection was made to the admissibility of the evidence, and no motion was made to exclude on account of supposed variance, the objection must be considered on appeal as waived."

See here our reply brief on motion to dismiss from p. 1 to 13 inclusive.

IV.

It Is Admitted by Defendant That Bryant Had Been Discharged From Its Service in Interstate Commerce, But It Claims That the Employers' Liability Act Controls, Because He Was Shot Before He Had Been Given a Reasonable Time to Leave the Defendant's Services After His Discharge.

Defendant's counsel relies, solely, on the question as to whether the Federal act extended to the parties, and controlled, until Bryant had been given a reasonable time to leave the service. Our contention, however, is, as we have above pointed out, and as shown in our former briefs, that Bryant was discharged from the defendant's service two days before the shooting occurred, and that even if he

was not actually discharged until shortly before he was shot, as claimed by defendant, that the act has no application. If the discharge, and the shooting were close together, does that operate to bring this case under the Federal Statute? And should it not be kept in mind that, that Statute was enacted for the benefit of railroad employees, and not for the benefit of the railroad employers. And here the defendant is claiming the benefit of the statute to defeat the recovery in this case, after its relations with its employee had ended, **and had been ended by its own act.** Is not this whole contention an anomalous one?

Is it not true that the very moment that Bryant was discharged that the contractual relations of master and servant between the defendant and Bryant ceased to exist? But the relation of master and servant is the relation that must exist to bring a case under the operation of the Federal Act. This appears to be self evident, we believe, from the very terms of the act itself. See the Statute quoted in our opening brief on motion to dismiss at p. 8.

Our Virginia Court said in the case of A. C. L. R. Co. v. Treadway's Admrx., 120 Va. 735 at p. 744, that under the Federal Employers' Liability Act, "the relationship of employer and employee is the same as that of master and servant. Therefore, when the relationship of master and servant ceases, the servant is no longer engaged in interstate commerce." See C. & O. Ry. Co. v. Harmon's Admr., 189 S. W., 1135 (Ky.).

When Bryan was discharged the contractual

relations between him and the defendant terminated. It is true that a section hand employed in the service of an interstate carrier, and in interstate commerce, is treated not only as in the employment of the carrier while engaged in work, but also in going to and in leaving his work, on the employer's premises. The going to and leaving the work are, however, necessarily incident to the employment and service. This was contemplated in the employment, and part of the employment contract. The cases relied on by defendant apply to servants going to and from their master's work. This, however, only applies during the relationship of master and servant. If the servant while at work is discharged, the relationship of master and servant terminates, and ends at once. The same principle, clearly, does not apply as in a case where a man had completed his day's work, and as he left the work for the day, was injured. In the one the relation of master and servant existed, but in the other, that relation had ended; had terminated upon the discharge. A servant in going to or leaving his work, on the premises of the master, is on the master's premises by contractual right. Leaving the work is a necessary incident, just as going to work is a necessary incident to the employment. A servant, however, who has been discharged by his master, stands in no contractual right, as to his late master. Their relations have been dissolved, they have become strangers. The servant, when he is discharged, at once becomes a mere licensee to use his late master's premises to

leave the employment, and if he does not leave promptly, when discharged, and directed to leave, he at once becomes a trespasser.

When Bryant was discharged, that very moment, he had, figuratively, stepped from the Federal jurisdiction, and stood alone within the state's jurisdiction. It can hardly be conceived that the Federal Act could apply for any purpose, after the relation of master and servant had ended.

It is admitted by the defendant, that it had discharged Bryant from its employment, yet, it claims that he was still in effect in its employment after the relation of employment had ended. This claim is made to defeat the plaintiff's right to recover. Is not the defendant estopped to set up and make such claim? Is not this pretention of defendant entirely without merit, and frivolous? **How was it possible for Bryant to have been in the defendant's employment, and out of its employment, at the same time?** And yet on this the defendant founds its case under the Federal Statute.

A common carrier railroad may be engaged, both in interstate and intrastate commerce, and if its servant employed in interstate commerce turns aside to do any kind of work in intrastate commerce, the very moment that he turns and begins work in intrastate commerce, the Federal Employers' Liability Act ceases to govern.

In the recent case of Foreman etc. Bank v. Grand etc. Ry. Co., a conductor on an interstate train was repairing a latch on an intrastate car in

his train, and was injured, and the Illinois courts held that he was not entitled to relief under the Federal Employers' Liability Act, because, at the moment of the injury, he was engaged in intrastate commerce; and on application to this court a writ of error was denied. 73 L. Ed. 302, number 639, on docket of this court at October term, 1928.

From analogy, did not Bryant's relations to the defendant, under the Federal act cease **the very moment** that he was discharged; and is not the state law alone applicable?

It was obviously, we believe, a question for the jury, or for the court on the demurrer to the evidence, to determine whether the relation of master and servant had ended at the time of the shooting. And the court is again referred to the case of Northwestern Union Packet Co. v. McCue's Admrx. 84 U. S. 508, as a case in point, and the opinion in that case is quoted in full in our brief opposing writ of certiorari, p. 9 et seq.

And we also again refer the court to the case of Pennsylvania Co. v. Marion Donat, 239 U. S. 49. The question in that case was whether the plaintiff at the time he was injured was engaged in interstate commerce. The defendant requested the District Court to charge that the plaintiff was not engaged in such commerce, at the time of the accident, and could not recover. The trial court refused the request and referred the question to the jury, which found for the plaintiff, and judgment was entered on the verdict. The District Court was sustained by the Circuit Court of Appeals, and the

case was brought to this court on writ of error. There was a motion under Rule 6, Section 5 to affirm the judgment. In sustaining the motion to affirm, this court said:

> "The question presented upon this writ of error is so frivolous as not to need further argument, and the motion to affirm the judgment below must be granted." See our brief opposing writ of certiorari, pp. 6 and 7.

V.

Three Issues Were Made and Determined in the Trial Court.

First: **Was Bryant in the employment of the defendant in interstate commerce at the time he was shot?**

Second: **Whether, or not, the defendant's foreman in the scope of his employment wrongfully shot and mortally wounded Bryant.**

Third: **Whether, or not, the death of Bryant was caused by the negligence of the defendant in putting a man in charge of its section force as foreman, when it knew, or ought to have known, by the exercise of ordinary care, that this man was an unfit and dangerous person to be given such a position.**

The first issue was made on the defendant's special plea (R. 22), and the plaintiff's replication

thereto (R. 24). It was admitted by the plaintiff, that the defendant was engaged as a common carrier in interstate commerce. The question then, whether or not, the case was controlled by the state or the Federal Statute, depended solely on whether or not Bryant was in the defendant's employment, in such commerce, at the time he was shot.

As said by this Court in the case of N. C. R. Co. v. Zachary 232 U. S. 248-256; 58 L. Ed. 591-594:

> "In order to bring the case within the terms of the Federal Act, defendant must have been, at the time of the occurrence in question, engaged as a common carrier in interstate commerce, and plaintiff's intestate must have been employed by said carrier in such commerce. If these facts appear, the Federal Act governed, to the exclusion of the Statutes of the State."

The general issue, not guilty, was plead by the defendant (R. 21), and the second issue was made on the first count of the declaration (R. 19), and the third issue on the second count of the declaration (R. 20).

All these issues were questions of fact for the jury, but the defendant demurred to the evidence, and the case stood, **even stronger for the plaintiff,** than if a verdict for the plaintiff had been found by the jury, and on the demurrer the trial court found all these issues for the plaintiff, and that finding was affirmed by the Supreme Court of Appeals of Virginia (R. 188).

We admit, however, that if this case is governed by the Federal Act, that the defendant cannot be held liable on the second issue, for the wrongful act charged in the first count of the declaration, because that act only applies to NEGLIGENCE of the defendant. **But not so, with the third issue, made on the second count of the declaration, for the law is well settled that "a plaintiff is entitled to recover, if he proves any one count, although he may fail to establish the others."** 31 Cyc. 675. The second count is founded on the **negligence** of the defendant and comes under the Federal Act, if that act governs. It is true that the allegations of the second count are not such as to bring it under the Federal Act, but that is immaterial if the evidence makes out a case under the Act.

The Court, on the demurrer to the evidence, could have given judgment for the plaintiff under the Virginia Statute, Va. Code, Section 6250, **supra,** p. 12, just as if facts had been pleaded that would bring this second count under the Federal Act. The concluding clause of that section provides as follows:

> "Or, instead of the pleadings being amended, the court may direct the jury to find the facts, and, after such finding, if it consider the variance such as could not have prejudiced the opposite party, shall give judgment according to the right of the case."

The Court under this statute could have directed the jury to find the facts, and then could have given judgment on the facts. But the defendant, by its demurrer to the evidence, took the case away from the jury, and the court on the facts found for the plaintiff. In this second count, but one right to recover is asserted, and both under the State and the Federal Statute the Court had jurisdiction. The court gave judgment for the plaintiff, and whether this case is governed by the State, or the Federal Statute we submit that the judgment should stand.

Judge Burks, in delivering the opinion of the Virginia Court in the case of Shumaker's Admx. v. A. C. L. R. Co., 125 Va., 393, at p. 397, said:

> "The trial court, however, clearly had jurisdiction under the Virginia Statute, if the injury was inflicted upon the plaintiff while engaged in intrastate commerce, and the Federal Statute also gave it jurisdiction if the plaintiff's intestate was, at the time of the injury, engaged in interstate comerce, so that whether he was engaged in intrastate commerce, or interstate commerce, the state court had jurisdiction. It was not necessary to mention in the declaration under which of the acts the plaintiff sued. It was sufficient if the facts alleged brought the cause of action within the terms of either statute." Citing Vickery v. New London etc. R. Co., 87 Conn. 634; 89 Atl. 277-279, and Mo. etc.

R. Co. v. Wulf, 226 U. S. 570; 57 L. Ed. 355.

In the case of Wabash R. Co. v. Hayes, 234 U. S. 86; 58 L. Ed. 1226, the plaintiff stated his case so as to indicate that he was claiming his right to recover, only, under the Federal Act, and the evidence showed that the injury did not occur in interstate commerce, and the court gave judgment for the plaintiff as made out by the evidence. Mr. Justice VanDevanter, in delivering the opinion in that case, said:

> "Instead of presenting his case in an alternative way, the plaintiff so stated it as to indicate that he was claiming only under the Federal Act. And when the proofs demonstrated that the injury arose outside of interstate commerce, and that therefore no recovery could be had under the Federal Act, the court was confronted with the question whether the declaration could be amended, or regarded as amended, to conform to the proofs. Holding that this could be done, the court treated the mistaken allegation that the injury occurred in interstate commerce as eliminated. Therein the court merely gave effect to a rule of local practic, the application of which was not in anywise in controvention of the Federal Act." Citing Second Employers' Liability Cases, Mondou v. New

> York, N. H. & H. R. Co., 223 U. S. 56-57; 56 L. Ed. 348, 349; 38 L. R. A. (N. S.) 44, and then said, "it follows that the contention that the defendant was denied a right or immunity to which it was entitled under the Federal Act is not only untenable, but so devoid of color as to furnish no basis for this writ of error." Citing Sawyer v. Piper, 189 U. S. 154; 47 L. Ed. 757.

Our Virginia Appellate Court is governed by a very practical and liberal statute, Section 6331, of the Virginia Code, 1919, which in so far as pertinent here, is as follows:

> "No judgment or decree shall be arrested or reversed . . . for any defect, imperfection, or omission in the pleadings, which could not be regarded on demurrer; or for any other defect, imperfection, or omission in the record, or for any error committed on the trial where it plainly appears from the record and the evidence given at the trial that the parties have had a fair trial on the merits and substantial justice has been reached."

There is another and stronger reason why the judgment on the second count should stand if the court should find that the Federal Act governs. The defendant in its special plea stated facts, that

if proven, bring this case under purview of the Federal Employers' Liability Act and thus aided the second count of the declaration, and supplied the allegations that bring the case under the Federal Act. The case by the defendant **pleading over** stands on the second count, just as if it had been set out in this count, that the defendant is a common carrier by railroad, engaged in commerce beween the several states, and that Bryant was killed while he was in the employment of said defendant, in such commerce. The issue was not made alone on the facts stated in the second count of the declaration, but was also on the facts stated in defendant's special plea. And that plea must be taken as amendatory of the declaration, if the Federal Act governs.

It is said in 16 Ency. of Pl. & Pr. p. 580:

> "When a declaration omits material allegations which are supplied by the plea, the omission is thereby cured."

In 31 Cyc. p. 714 it is said:

> "If a necessary allegation is omitted from a pleading, and the missing allegation is either alleged or admitted by the pleading of the adverse party, the defect is cured."

It was said by the Illinois Court in the case of Wallace v. Curtiss, 36 Ill., 156, and approved by the same court in Rubens v. Hill, 231 Ill. 523, 72 N. E. 1127:

> "The pleas cured the omission . . . The issues were not alone on the facts stated in the declaration, but upon the agreement stated in the special plea, and they may be taken as amendatory of the declaration, of the issue, and verdict, in order to favor the justice of the case." See United States v. Morris, 10 Wheat. 246, Simonton v. Winter, 5 Pet. (U. S.) 141, 8 L. Ed. 75.

The Connecticut Court said in the case of Vickery v. New London Northern R. Co., 89 Atl. 277 at p. 280:

> "The trial court erred in withholding from the plaintiff the desired leave to amend, for the reason assigned, but that error can be of no help to him here. The complaint remained unamended and barren of allegations showing the application of the Federal statute. The omitted allegations of the third defense, however, brought the pertinent facts upon the record, and supplied the absence of them in the complaint. Brooks v. Brooks, 1 Sid. 184; U. S. v. Morris, 10 Wheat, 246, 286, 6 L. Ed. 314; Slack v. Lyon, 9 Pick (Mass.) 62, 65; Rubens v. Hill, 213 Ill. 523, 537, 72 N. E. 1127; Hedderly v. Downs, 31 Minn. 183, 186, 17 N. W. 274. This doctrine of express aider is one of which we have ap-

proved as resting upon principles of justice. Wall v. Toomey, 52 Conn. 35, 38. Under its application the complaint, defective though it was for lack of allegation of material facts, had its defects in that respect cured, and the missing allegations supplied by their subsequent averment by the defendants and admission by the plaintiff." See 1 Chitty's Pleading, 7th Ed., 703.

It should also be kept in mind that **"on a demurrer to the evidence, the court does not look critically into a variance between a declaration and proofs."** (Italics supplied.) 6 Ency. Pl. & Pr. 404. At common law many faults were cured by a verdict, or by judgment on demurrer to the evidence. It is said in 1 Chitty's Pleading (7th Ed.) 705: "The expression **cured by verdict** signifies that the court will, after a verdict presume or intend that the particular thing which appears to be defectively or imperfectly stated or omitted in the pleadings was duly proved at the trial." And our statute of Joefails covers a multitude of faults, Sec. 6331 of Virginia Code, quoted supra page 25; and Section 6104 of Virginia Code, directs that "The court shall at every stage of the proceedings, disregard any error, or defect, which does not affect the substantial rights of the parties." See So. Ry. Co. v. Finley, 127 Va. 132, at p. 138.

It is not questioned here, or pretended by the defendant, that the second count of the declaration

does not state a good case. See Northern etc. R. Co. v. Mares, 123 U. S. 721; 31 L. Ed. 296. And, "a plaintiff is entitled to recover, if he proves any one count, although he may fail to establish the others." 31 Cyc. 67
Under this count it devolved on the plaintiff to prove two facts, first, that the defendant was negligent in putting Dodson, an unfit and dangerous man, in charge of the section force, and second, that Dodson, in the course of his employment, shot and mortally wounded Bryant.

VI.

Was Dodson an Unfit and Dangerous Person to be Placed in Charge of Defendant's Section Force?

A number of witnesses for the plaintiff testified on this subject, and in presenting their evidence we will be governed by the rule on a demurrer to the evidence, and state the testimony of witnesses in the most favorable light, for the plaintiff.

G. T. Wright said (R. 32) **"he (Dodson) was a high-tempered man, and he was a man that I wouldn't work under . . .** and I wouldn't like to work with him or under him . . . you couldn't suit him in no way you would do your work. And (R. 33) said, "he was a hard man to get along with, and of a **peculiar nervous and irritable disposition."** And (R. 34) said, "that he couldn't get along with men."

Samuel J. Wright said (R. 49), referring to Dodson, "he was a man like this, he would fly up,

HE WAS KINDA FLIGHTY, and would fly up where I didn't think he had any business doing it . . . THEY SAY THERE WAS SOMETHING WRONG WITH HIM, but I don't know"; and this witness said that this was Dodson's general reputation (R. 51).

John L. Price said (R. 73), about Dodson, "he was considered a quick tempered man, he was very quick in temper, he would take up little things, sometimes, that possibly wouldn't amount to anything much, he had that disposition and he was **quick or nervous, or something. I don't know what the trouble really was, but he would fly off at little things** that possibly wouldn't amount to anything much"; and (R. 74) said, **"he would fly up for no reason for it, lots of times,"** and that, this was Dodson's general reputation.

E. C. Thompson said (R. 99), in referring to Dodson, "he was a pretty fiery man," and that the general reputation of Dodson was that "HE WAS A MIGHTY PECULIAR FELLOW."

C. B. Alfred said (R. 111) about Dodson's temper and disposition, **"he had a very mean one, he was a man that couldn't get along with nobody,** it looked like you (he) couldn't speak right (to) nobody he had working with him, and he had a way that nobody liked, he didn't know how to speak to you when he talked to you"; and said that this was Dodson's general reputation.

Frank Alfred said (R. 113), that Dodson "would get mad at little or nothing," and that this frequently happened; and on cross examination

said (R. 114), "he would get mad with the men up there, and wouldn't speak to nobody, he just would get mad at anything."

William M. McDowell said (R. 105), about Dodson, " as far as I knowed of him, he was a kind of impassioned, very quick, it didn't seem to take very much to throw him out of passion, HE WAS NERVOUS OR SOMETHING OF THE KIND." And this the witness said was generally known in the community.

The question, however, is, did the defendant know what manner of man Dodson was, when it placed him in charge of its section force, as a substitute for Long, who was its regular foreman. Dodson was placed in charge by Long (R. 145, 150) with the approval of Mr. Crance (R. 139, 141). Dodson and Long lived together. They "batched" together in Dodson's cabin, and lived apart from their families. Long full-well knew the character of man that Dodson was. He knew that Dodson carried a pistol, a serious offense in Virginia, and Long knew that Dodson was "a **nervous and high tempered man, and dangerous, and liable to shoot any one about him.**" Long said in the presence of Dolph M. Wright (R. 124) that "he (Dodson) heard a noise, and that he was kinda nervous and scary like, and that he just shot through the window," and said that this was before Bryant was shot. Long said in the presence of Taylor Thompson (R. 125-6), a week or so before Bryant was shot, "that Dodson got up one night, he heard a racket around the house, and he shot two or three

times, maybe three, through the screen on the window, and he said "THAT IT WAS DANGEROUS FOR A MAN TO BE AROUND THE HOUSE OVER THERE," that Dodson would just shoot whenever he heard a racket, and that he got up that night and shot through the screen.

Long said in the presence of Samuel J. Wright (R. 128) in referring to Dodson, "THAT IT WAS REALLY DANGEROUS THAT THE MAN (DODSON) WAS NERVOUS, AND IT WOULDN'T DO FOR ANY ONE TO FOOL AROUND WHERE HE WAS AT" (R. 128); and Long said in the presence of Samuel J. Wright in referring to Dodson (R. 130), **"he is a nervous man . . . that he was nervous and had been shooting up there,"** referring to the cabin where Long and Dodson lived; and Long further said in the presence of this witness (R. 131), "HE (DODSON) WAS NERVOUS AND REAL DANGEROUS," and Samuel J. Wright said that Dodson (R. 131), **"would curse the other men."** Long said in the presence of W. M. McDowell (R. 134), "that they heard a racket up at the house one night, and Mr. Dodson got up and shot through the screen window, AND THAT IT WOULD BE DANGEROUS FOR ANYBODY TO FOOL AROUND WHERE MR. DODSON WAS, THAT HE WAS NERVOUS, AND THEY WOULD BE LIABLE TO BE SHOT"; and Long further said (R. 135), "THAT IT WAS DANGEROUS FOR ANY ONE TO FOOL AROUND WHERE HE WAS, BECAUSE HE WAS NERVOUS AND LIABLE TO SHOOT."

That Dodson carried a pistol is an admitted fact in this case, in violation of the law of the State, and used it while in charge of the section force in shooting Bryant. Long and Dodson lived in the closest relation; Long admitted that he knew that Dodson carried a pistol, and said (R. 157), **"he carried it himself, I did not permit him to do it,"** and said, **"I suppose he carried it to protect his own self."** Long was bound to have known the reputation of Dodson. He certainly must have known what the other section hands knew, and that according to reputation, "THERE WAS SOMETHING WRONG WITH DODSON," that "HE WAS KINDA FLIGHTY, HIGH TEMPERED, AND NERVOUS," and "**had a very mean reputation as to temper and disposition.**" Shortly before Bryant was shot, he said "THAT IT WAS REALLY DANGEROUS THAT THE MAN (DODSON) WAS NERVOUS, AND IT WOULDN'T DO FOR ANY ONE TO FOOL AROUND WHERE HE WAS AT"; that "IT WAS DANGEROUS FOR ANY ONE TO FOOL AROUND WHERE HE WAS BECAUSE HE WAS NERVOUS AND LIABLE TO SHOOT, AND THAT HE WAS NERVOUS AND REAL DANGEROUS." This is what the defendant knew when it put Dodson in charge of its section force, of which Bryant was a member. This evidence showing what the defendant knew about Dodson, is admitted, every word of it, on defendant's demurrer to the evidence, and every inference that can be drawn therefrom. The inference is, that the defendant

knew of the dangerous character, and unfitness of Dodson, and that he went armed with a pistol, when about his work. The fact that Dodson shot Bryant under the circumstances appearing in the record, certainly makes it clear that Dodson was an unfit and dangerous man to have been put in charge of defendant's section force, and knowing Dodson, as Long did, it must be inferred on the demurrer to the evidence that he was bound to have learned, and to have known the real character of the man. There is always something about a man's actions and conduct that reveals his true character.

Is it not evident that a jury might have found from this evidence, that the defendant knew that Dodson was an unfit and dangerous person to put in charge of its section force, and that he was liable to do some one under him in the service serious personal injury? This was found by the state courts on the demurrer to the evidence, and has been finally settled. As said by Judge Burks in the opinion of the Supreme Court of Appeals of Virginia (R. 164), "on a demurrer to the evidence, the demurrant is taken as admitting all inferences that a jury might fairly draw in favor of the demurree from his evidence. If an inference favorable to the demurree might be fairly drawn from any portion of his evidence, though that evidence was not entirely harmonious and consistent, the jury may draw it, and whatever inference the jury might have fairly drawn, the court must draw."

If Dodson, in the course of his employment, shot Bryant, then there can be no question about the defendant's liability.

VII.

Did Dodson, in the Course of His Employment by Defendant Shoot Bryant?

It is admittted by the defendant, that Dodson at the time of the shooting, was in its employment, and actually engaged in representing it at that time, as its section foreman. He represented his master, the defendant. He stood in the place of his master, and the master was liable for his acts, just as an individual would have been, if he had personally acted in the circumstances, as shown by the evidence here.

It was said by this Court in Ry. Co. v. Quigley 21 How. 202, 16 L. Ed. 73, that, **"for acts done by the agents of a corporation, either in excontractu or in delicto, in the course of its business and of their employment, the corporation is responsible as an individual is responsible under similar circumstances."** (Italics supplied.) This rule is broad, wise, and humane, and all of the well considered cases follow it.

Scope of employment is defined in Mechem on Agency (2nd Ed.) Section 1960, p. 1523, as follows:

> "In general terms, it may be said that an act is within the course of employment if (1) it be something fairly and naturally incident to the business, and if (2) it be done while the servant was engaged in the master's business and be done, although

> mistakenly or ill-advisedly, with a view to further the master's interest, or from some impulse or emotion which naturally grew out of or was incident to the attempt to perform the master's business, and did not arise wholly from some external, independent, and personal motive on the part of the servant to do the act upon his own account."

It cannot be claimed here by the defendant that the evidence in the record shows that Bryant was shot by Dodson wholly from some external, independent, and personal motive. Dodson, in fact, said (R. 93, 94), that he **"had no personal feelings, no ill-will or hatred against Bryant."**

What is the scope of employment is, ordinarily, a question of fact, and to be determined by a jury. It is said in 4 Elliott on Railroads (3rd Ed.) Section 1820, **"The scope of authority is as a rule to be determined from the facts of the particular case, and is usually a question of fact." (Italics supplied.)**

It is admitted by the defendant that Dodson as foreman had authority to hire and discharge servants of the defendant, and that he actually did discharge Bryant. Having this authority, Dodson had the authority incident to it, had the power to require Bryant to leave the premises, and if he refused, Dodson had authority to use force to eject him from the service. If Bryant, when discharged, refused to leave, he became a trespasser, and Dodson had implied authority to use such force as was

necessary to eject Bryant, and the defendant is liable if Dodson used more force than was necessary. The evidence shows that Bryant certainly refused to leave the premises, when directed. He refused to go at the point of a pistol leveled at him, at short range, which in itself was a common law assault. Dodson as foreman, besides authority to work his force, was vested with authority to look after the company's property in general. It is true that one of the defendant's witnesses, said (R. 147), that Dodson had no authority to eject trespassers, but that was a mere matter of opinion, but if evidence, it is waived on the demurrer to the evidence, because it is in conflict with pertinent and material circumstances in the case that are in evidence. First, that Dodson had full charge and control of the force of hands working on that section, and all necessary implied powers. But more than that, according to Mr. Crance, Supervisor of tracks, he had authority, among other things, to "LOOK AFTER THE COMPANY'S PROPERTY IN GENERAL" (R. 141). From these circumstances, it is obvious that he had authority to eject a servant who had been discharged and refused to leave, or who, after he had been discharged, came back and refused to leave after being directed to leave. Dodson, being in charge of the company's property in general, represented his master, the defendant, and had authority to do anything that the defendant, if it had been an individual, could do, and therefore had full authority to eject a trespasser who refused to leave the defendant's premises when directed.

It is said in 26 Cyc. 96, and 39 C. J. 91:

> "Upon his discharge, a servant must leave peaceably, whether or not the discharge was rightful . . . If he fails to leave, **or if after doing so returns,** he becomes a trespasser, and may be ejected by the master, although his wages may not all have been paid." See Merrell v. Coates, (Minn.) 111 N. W. 834, and Wilson v. Fowler Packing Co., 255 Pac. 1109. See also 20 A. and E. Ency. of Law 36. (Italics supplied.)

In the case of Rogahn v. Moore Mfg. etc. Co. (Wis.) 48 N. W. 669, referred to mistakenly in the opinion of Judge Burks (R. 174), as appearing in 43 N. W. 669. The facts were in substance as follows: The plaintiff, Rogahn, had been employed by the defendant's foreman, Beaman. He had the authority to engage and discharge men in the foundry department of the defendant. Beaman ordered the plaintiff to do certain work, and he refused to do it. Beaman forthwith discharged the plaintiff, and directed him to leave the shop at once. The plaintiff replied that he would do so **as soon as he could get ready.** The foreman was not satisfied with this, and to hasten the plaintiff out of the shop, forcibly pushed and kicked him, and he fell and broke his leg. It was urged by the defendant that the act of the foreman was not within the scope of his employment. The Court, in deciding for the plaintiff, said:

> "The foreman was authorized by the company to discharge workmen, and he might lawfully use such reasonable force as was necessary to remove the discharged men from the shop. This would be necessarily implied from the nature of the authority given him. There has been much discussion in the Courts as to how far the master is liable for the torts of his servant, and many nice distinctions have been made; but it is generally agreed that for the negligent or wrongful acts of the servant in the line of his duty, for which the master would be liable if the act was done by himself, the master is responsible. This principle is illustrated and applied in numerous cases found in the books."

The case of Jebeles & Colias Confectionery Co. v. Booze (Ala.) 62 So. 12, bears a close analogy to the Rogahn case, supra, and to the case at bar.

It is contended by the defendant that when Bryant went back to offer to work on Monday morning, and from a remark that he made that Dodson would probably "fire" him, that Bryant had not been actually discharged on Saturday. This, however, is a contention by the defendant that cannot be made on his demurrer to the evidence. Bryant, when he offered to work on Monday morning, stood, as we have pointed out in our reply brief on motion to dismiss, pages 18 and 19, as a licensee or invitee, and the defendant had the im-

plied right to tell him to leave, and if he refused to leave, to eject him, if doing so was necessary. If, however, Bryant, after being discharged, came back and started to work, and was told to leave and refused to go, he at once became a trespasser, and the defendant had implied authority to eject him as a disturbing agent. Dodson not only had this authority as foreman in charge of the force working under him, but as being in charge of the defendant's property, as we have pointed out supra.

It is said in Patterson's Railway Accident Law, Section 111:

> "The doctrine of most of the cases, however, is that whenever a railway servant is put in charge of any property of the railway . . . , that the servant is necessarily charged with the duty of protecting that particular property, and he is therefore for that purpose vested with implied authority to remove trespassers therefrom; and if he makes a mistake . . . by using unnecessary violence . . . the railway must be held liable." This doctrine was approved in Childress v. So. Pac. Co. 149 Pac. 309.
>
> "One who is lawfully in charge of premises and has required another to leave whom he has the right to require, may lawfully use so much force as is necessary to remove such other, after allowing him reasonable time to depart." 3 Cyc. 145-6. 5 C. J. 745. Montgomery's case, 98 Va. 840.

As we have pointed out, supra, the question as to whether Bryant acted within the scope of his employment is a jury question that was settled in favor of the plaintiff on the demurrer to the evidence.

It is said in Wiley v. Pere Marquette R. Co. (Mich.) 209 N. W. 59:

> "The question as to scope of authority is a question of fact, and not of law." And it was held in another Michigan case, Schulte v. Holiday, 19 N. W. 752, that "the question whether the servant is acting within the scope of his employment depends upon the facts as to which the finding of the jury is conclusive." See De Hawars v. Hennesey Bros., 137 Fed. 472, Balto. etc. R. Co. v. Pierce (Md.) 45 L. R. A. 527, Brough v. Fowle, 73 N. E. (Mass.) 851; Collins v. Wise (Mass.) 76 N. E. 667; 5 Fletcher's Cyc. Corp. p. 5212.

This Court, in the case of Denver etc. Ry. Co. v. Harris, 122 U. S. 610, 30 L. Ed. 1146, approvingly quoted from State v. Morris etc., R. Co., 23 N. J. L. 369, as follows:

> "If a corporation has itself no hands with which to strike, it may employ the hands of others; and it is now perfectly well settled, contrary to the ancient authorities, that a corporation is liable **civ-**

> **iliter** for all torts committed by its servants or agents by authority of the corporation, express or implied. . . . The result of the modern cases is that a corporation is liable **civiliter** for torts committed by its servants or agents precisely as a natural person; and that it is liable as a natural person for the acts of its agents done by its authority, express or implied." Citing Salt Lake City v. Hollister, 118 U. S. 256-60; 30 L. Ed. 176-8; New Jersey Steam Boat Co. v. Brockett, 121 U. S. 637, 30 L. Ed. 1049; National Bank v. Graham, 100 U. S. 699-702, 25 L. Ed. 750-1.

The case of Davis v. Merrill, 133 Va. 69, liberally quoted from by Judge Burks in his opinion (R. 172-3), was where a passenger in an automobile was shot by a servant of the Norfolk & Western Railroad and killed at Norfolk, Va. The automobile was running on Brambleton Avenue over which the N. & W. Ry. crosses. The gates were closed. The gate-man, the railroad company's servant, Ford, was called on by the chauffeur to open the gates. Some words passed between Ford and the chauffeur. Ford then opened the gates, and as the automobile started over the tracks, Ford shot three times at it, and one of the shots struck the deceased, Claudia Harrell, in the back and caused her death. There were two counts in the declaration, and one of the counts, as in the case at bar,

charged that the defendant, the Norfolk & Western Railway Company, was guilty of negligence in employing Ford, knowing that he was an incompetent and dangerous person, and that the shooting was done within the scope of his employment. There was a verdict for the plaintiff, and it was sustained by the trial court, and by the Supreme Court of Virginia, and it was held that the railroad company was liable on both counts, and the evidence of the incompetency and dangerous character of Ford was no stronger, we believe, than in the instant case. This case of Davis v. Merrill is specially referred to as a well considered case, and is directly in point.

VIII.

Defendant's Sole Reliance for Reversal is That This Case is Governed by the Federal Employers' Liability Act.

Learned counsel for the defendant has waived aside, or rather, has entirely ignored the rights of the plaintiff in this case under the second count of the declaration. He apparently treats both counts as resting on the same principle, that the acts charged in each count are wrongful acts, not provided for in the Federal act. Long, representing the defendant, with the approval of Mr. Crance, supervisor of tracks, the agents and representa- of the defendant, placed Dodson in full charge of the section force (R. 139, 141, 145, 150), although

Long full well knew the unfitness and dangerous character of Dodson. This, as we believe, was obvious negligence of the defendant that resulted in the death of Bryant. But this is not referred to, or even considered by learned counsel for the defendant in his brief on the merits. There is nothing in fact presented in his brief on the merits, that was not fully discussed in his briefs, not on the merits. And it can hardly be claimed by the defendant, with any confidence, that the cases of Davis v. Green, 260 U. S. 349, and Atlantic Coast Line R. Co. v. Southwell's Admr., 275 U. S. 64 have any practical application to this case, as made out on the second count of the declaration.

The arguments of defendant's counsel in his briefs are merely **De fumo disceptare,** and at best are as said by Suetonius, **"Arenae sine calce."**

IX.

Our Briefs Heretofore Filed.

We respectfully request that the brief that we filed opposing writ of certiorari, and our opening, and reply briefs on our motion to dismiss, may be read and considered as if they were fully set out in this, our brief on the merits of the case.

X.

In Conclusion.

We submit:

First, that the evidence clearly shows, on the demurrer to the evidence, that Bryant was not in

the defendant's employment in interstate commerce, at the time he was shot, that the Federal Employers' Liability Act does not govern, that this Court has no jurisdiction, and that the plaintiff's motion to dismiss ought to be sustained, and:

Second, that if the Federal Act governs, that a good case has been made out under the Act, on the issue made on the second count of the declaration and defendant's special plea, and that the judgment of the state court ought to be affirmed.

Respectfully submitted,

CHARLES CURRY,
Attorney for Respondent, R. L. Bryant,
Administrator of the Estate of M. L. Bryant,
Deceased.

R. B. STEPHENSON
and
CURRY CARTER,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

No. 113.—October Term, 1929.

The Chesapeake & Ohio Railway Company, Petitioner,
vs.
R. L. Bryant, Administrator of the Estate of M. L. Bryant, Deceased.

On Writ of Certiorari to the Supreme Court of Appeals of the State of Virginia.

[February 24, 1930.]

Mr. Justice Holmes delivered the opinion of the Court.

This is an action seeking to charge the petitioner for the death of the respondent's intestate, who was shot and killed by the foreman of a gang in which the deceased if not discharged would have worked. At the trial the petitioner demurred to the evidence, on the ground, among others, that at the time of the killing the parties were engaged in interstate commerce. The demurrer was overruled and the respondent (plaintiff) got judgment, which was affirmed by an equally divided Court. If the parties were governed by the federal Employers' Liability Act the respondent might have difficulties from the decisions of this Court. *Davis* v. *Green*, 260 U. S. 349. *Atlantic Coast Line R. R. Co.* v. *Southwell*, 275 U. S. 64. But the deceased was killed on Monday and there was some evidence that he had been discharged on the Saturday before. If so the Act of Congress did not govern and the parties were left to the State law, with which we have no concern. The writ of certiorari would not have been granted but for the impression that there was no doubt that the deceased was employed by the petitioner in interstate commerce up to the moment immediately preceding his death.

Judgment affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.